82-629

Office - Supreme Court, U.S.
FILED
SEP 28 1982
... STEVAS.

No._____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION, Petitioners,

v.

WOLD ENGINEERING, P.C.,
A NORTH DAKOTA PROFESSIONAL CORPORATION,
Respondent.

v.

SCHMIDT, SMITH & RUSH, Respondent

PETITION FOR A WRIT OF CERTIORARI FROM NORTH DAKOTA SUPREME COURT

Hugh McCutcheon
Attorney for Wold Eng.
Box 939
Minot, ND 58701

Jan M. Sebby
Attorney for Schmidt *et el*
Box 1000
Minot, ND 58701

John O. Holm
17 Second Avenue West
Dickinson, North Dakota 58601

Attorney for Petitioners

QUESTION PRESENTED FOR REVIEW

Did the State Trial Court have jurisdiction to hear and decide a cause of action brought by a federally recognized Indian Tribe against a Non-Indian Defendant regarding a matter arising within the exterior boundaries of the Indian Reservation?

PARTIES TO ACTION

The Parties to this Appeal and who have an interest in its outcome are:

Petitioner - Three Affiliated Tribes

Respondents - Wold Engineering, P.C. and Schmidt, Smith & Rush (did not participate in lower appeal but has interest in action)

TABLE OF CONTENTS

Page

Question Presented for Review 1

Parties to Action 1

Table of Contents 2

Table of Authorities 3-5

Report of Opinion Below 5

Jurisdictional Grounds 5

Constitutional and Statutory Provisions 6-7

Statement of Case 6-8

Reasons for Allowing Writ 8-14

Conclusions 4

Appendices:

Appendix A - Judgment of Dismissal District Court, State of North Dakota 1a

Appendix B - Notice of Appeal of Petitioner to North Dakota Supreme Court . 2a

Appendix C - Decision of North Dakota Supreme Court 3a-10a

TABLE OF AUTHORITIES

Cases:	Page
Bad Horse vs Bad Horse, 517 P.2d 893 (Mont), *cert denied* 419 U.S. 847	10
Begay vs Sawtelle, 53 Ariz. 304, 88 P.2d 999 (1939)	10
Boddie vs Connecticut, 401 U.S. 371 (1971)	13
Bonnet vs Seekins, 243 P.2d 317 (Mont. 1952)	10
Bradley vs Arizona Corp. Commission, 60 Ariz. 508, 141 P.2d 524 (1934)	10
Byran vs Itasca County, 426 U.S. 373 (1976)	10, 12-13
Cherokee Nation vs Hitchcook, 187 U.S. 294 (1902)	10
Deere vs St. Lawrence River Power Company, 32 F.2d 550 (C.A.A. 2nd 1929)	8
Felix vs Patrick, 145 U.S. 317 (1892)	8, 13
Harrison vs LaVeen, 67 Ariz. 337, 196 P.2d 456 (1948)	10
Jones vs Rath Packing Co., 430 U.S. 519 (1977)	12
Kennedy vs District Court, 402 U.S. 432 (1971)	11
McClanahan vs Arizona State Tax Commission, 411 U.S. 164 (1974)	9, 12
Mescalero Apache Tribe vs Jones, 411 U.S. 145 (1973)	12, 13
McCrea vs Busch, 524 P.2d 781 (Mont. 1974)	10
Moe vs Confederated Salis and Kootenai Tribes, 425 U.S. 463 (1976)	12
Paiz vs Hughes, 475 N. Mex. 562, 417 P.2d 51 (1966)	10
People vs Dibble, 62 [21 How.] U.S. 366 (1858)	12
Poitra vs Demarries, 502 F.2d 23, (8th Cir. 1974), *cert denied* 421 U.S. 934	11
Smith vs Temple, 82 S.D. 650, 152 N.W. 2d 547 (1967)	10

Table of Authorities Continued

Cases: Page

State *ex. rel.* Iron Bear vs District Court, 512 P.2d 1292 (Mont. 1973) 10

Three Affiliated Tribes vs Wold Engineering, *et. al.*, 321 NW2d 510 (N.D. 1982) 7, 8, 9

United States vs Candeloria, 271 U.S. 432 .....8, 13

United States *ex rel* Standing Bear vs Cook, 25 Fed. Cas. No. 14891 (C.C. Neb. 1879) 8

White Mountain Apache Tribe vs Brechen, 100 S.Ct. 2578 (1980) 10

Williams vs Lee, 358 U.S. 217 (1959) 9, 12, 13

Worcester vs Georgia, [6 Pet.] 515 (1832) 13

Wounded Head vs Tribal Council, 507 F.2d 1079 (8th Cir. 1975) 11

Constitutional Provisions:

United States Constitution:

Fourteenth Amendment: 14

North Dakota Constitution:

Art. I, §9 13

Statutes:

Federal:

25 USC § 1322 (a) 9, 11,12

Act of Feb. 22, 1889, ch 180, 25 Stat 676 10

Act of June 20, 1910, ch 310, 36 Stat 557 10

Act of July 16, 1894, ch 138, 28 Stat 107 10

Act of March 30, 1802 (2 U.S.L. 139) 12

North Dakota:

N.D.C.C. ch 27-19-01 11

Three Affiliated Tribes:

Art. II, § 1 (a) 13

Hearings:

Hearings on Constitutional Rights of the American Indian before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary:

86th Cong., 1st Sess. pt 1 at 224 (1961) 11
87th Cong., 2nd Sess. pt 3 at 769 (1962) 11

REPORT OF OPINIONS BELOW

On January 18, 1982, the State District Court issued an unreported opinion dismissing Petitioners action for lack of Jurisdiction. (See Appendix A, *infra*). Petitioners filed an appeal to the North Dakota Supreme Court for review of that decision on February 23, 1982. (See Appedix B, *infra*). On July 23, 1982 the North Dakota Supreme Court affirmed the District Court's decision of Judgment of Dismissal. The North Dakota Supreme Court's decision is reported at 321 N.W.2d 510 (N.D. 1982). (See Appendix C, *infra*).

Appeal is taken from the decision of the North Dakota Supreme Court.

JURISDICTIONAL GROUNDS

The date of the Judgment of the North Dakota Supreme Court affirming the District Court's Judgment of Dismissal was entered on July 23, 1982.

Jurisdiction of this Court to review the July 23, 1982, Judgment is conferred by 28 USC § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provisions involved in the case are:

U.S. **Const.**, Art. 1 § 8, cl 3:

> (The Congress shall have Power) To regulate Commerce with Foreign Nations, and among the several states, and with Indian Tribes;

14th *Amend.*, U.S. **Const.**, § 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutory provision involved in this action is 24 USC 1322 (a):

> Assumption by State of civil jurisdiction — Consent of United States; force and effect of civil laws
>
> (a) The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any and all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

STATEMENT OF CASE

The Three Affiliated Tribes is a federally recognized Tribe, who is organized under the Indian Reorganization Act, and whose reservation boundaries are those of the Fort Berthold Indian Reservation located within the State of North Dakota.

The Three Affiliated Tribes contracted with Respondent, Wold Engineering, P.C. to design and construct a water intake system from Lake Sakakawea to provide water for the Four Bears Mote, Tribal Administration building and the Four Bears Community located in McKenzie County, North Dakota and all contained within the exterior boundaries of the Fort Berthold Reservation. Respondent, Wold Engineering, P.C., is a professional corporation organized under the laws of the State of North Dakota and whose officers are located outside the exterior boundaries of the Fort Berthold Reservation as is Respondent, Schmidt, Smith & Rush.

Petitioner, Three Affiliated Tribes, accepted upon advice of Wold Engineering, the water intake system. During the winters of 1977 and 1978, the system froze up and became inoperable.

On April 7, 1980, the Three Affiliated Tribes filed action for damages due to negligent design and breech of contract against Respondent, Wold Engineering, P.C. arising out of the malfunctioning of the water system. Wold Engineering, P.C. then brought Schmidt, Smith & Rush in as third party defendant.

On January 12, 1982, the trial upon the merits began. On January 12, 1982, Respondent, Wold Engineering, P.C., moved the trial Court to dismiss Petitioner's complaint for lack of jurisdiction. This was the initial action taken to bring in a federal question. On January 18, 1980, the trial Judge, granted the Motion of Dismissal.

On February 23, 1982, Petitioner filed its Notice of Appeal to the Supreme Court of North Dakota. (Appendix B, *infra*).

On July 23, 1982, the North Dakota Supreme Court entered its affirmation of the District Court's Judgment of Dismissal. (Appendix C, *infra*).

Remittier was entered with the District Court on July 26, 1982.

The Judgment of Dismissal as affirmed by the North Dakota Supreme Court was based upon the Non-acceptance by

the Three Affiliated Tribes pursuant to 25 U.S.C. § 1322 (a) of State Jurisdiction over matters arising within the exterior boundaries of the Fort Berthold Reservation.

REASONS FOR ALLOWING WRIT

The North Dakota Supreme Court decision below holds that an Indian Plaintiff, whether an individual or Tribe, cannot bring an action in State Court against a Non-Indian where the cause of action arose within the exterior boundaries of the Reservation. *Three Affiliated Tribes vs. Wold Engineering, P.C., et. al,* 321 N.W.2d 510 (N.D. 1982). This decision may have significant impact upon Reservation Indians and Tribes. Without access to State Courts, Indian Plaintiffs are left in a jurisdictional nightmare. Important decisions involving off-reservation defendants are abundant; they usually do not involve the necessary requisite for federal jurisdiction. The decision below significantly impairs the ability of Tribes and individuals to contract and do business with non-reservation enities. It also may prohibit enforcement of, for example, educational and welfare benefits, deriving from the State, of which tribes and reservation Indians are entitled and where federal jurisdiction may not exist. The alternative left to tribal governments are either pass jurisdictional statues themselves to bring non-members into Tribal Court or to accept State Jurisdiction uner 25 U.S.C. § 1322 (a). Neither alternative is satisfactory. The first involves Service of Process and Judgment enforcement problems. The second flys in the face of the intent of Section 1322 (a), a free consent to jurisdiction.

The decision in *Three Affiliated Tribes, supra* not only causes significant practical problems but is in direct conflict with the Federal Courts who have addressed this issue. *See Deere vs St. Lawrence River Power Company,* 32 F.2d 550 (C.C.A. 2nd 1929); *United States ex. rel. Standing Bear vs Cook,* 25 *Fed. Cas.* No. 14891 (C.C. Neb. 1879).

Furthermore, it is in conflict with this Court's decision in *Felix vs Patrick,* 145 U.S. 317, 332 (1892) and *United States vs Candelaria,* 271 U.S. 432.

Although these cases predate the Indian Civil Rights Act, (IRCA) 25 U.S.C Section 1322 (a), they give a basis to start with the premise of state jurisdiction in matters involving Indian Plaintiff and Non-Indian Defendants. Subsequent decisions and practice which both predate and postdate the ICRA of this Court are also in direct conflict with the North Dakota Supreme Court's decision in *Three Affiliated Tribes, supra.*

In *Williams vs Lee,* 358 U.S. 217 (1959) this Court determined that a non-Indian could not sue an Indian in State Court over a cause of action arising on the Reservation. However, this Court noted:

> Over the years this Court has modified these principles [*Worcester vs State of Georgia,* 6(Pet) 515 (1832)] in cases where essential tribal relations were not involved and the rights of Indians would not be jeopardized but the basic policy of Worcester has remained. *Thus suits by Indians against outsiders in State Courts have been sustained.*

Williams, supra at 219 (emphasis added) (dictum).

The *Williams* decision predates the ICRA, but its dictum was reaffirmed in further dictum of this Court in the post-ICRA case of *McClanahan vs Arizona Tax Commissioner,* 411 U.S. 164, 171 (1974), *quoting Williams vs Lee* 358 U.S. 217, 219 (1959). *McClanahan, supra* went on: "Indians today are American citizens. They have the right to vote, to use State Courts....." *Id.* at 172-73. The *McClanahan* decision discussed at length the ICRA which this Court apparently felt no barrier to Indian access to State Courts.

It would appear the dictum stating Indians do have access to State Courts was related to the fact that the *McClanahan* case itself involved an Indian Plaintiff suing the Non-Indian off-reservation Defendant in State Court.

Furthermore, a survey of many Indian law cases that have been decided by this Court involved appeals from State Court decisions where a Tribe or Individual Indian Plaintiff sued a non-Indian Defendant regarding causes of action arising within the boundaries of the reservation. *See, e.g., McClanahan,*

supra; Cherokee Nation vs Hitchcook, 187 U.S. 294 (1902) *Bryan vs Itasca County,* 426 U.S. 373 (1976) *White Mountain Apache Tribe vs Bracken,* 100 S. Ct. 2578 (1980).

The decision below is also in conflict with all State Courts of last resort that have addressed this issue. *See McCrea vs Busch,* 524 P.2d 781 (Mont. 1974); *Bad Horse vs Bad Horse* 517 P.2d 893 (Mont) *cert denied* 419 U.S. 847; *State ex rel Iron Bear vs District Court,* 512 P.2d 1292 (Mont. 1973); *Bonnet vs Seekins,* 243 P.2d 317 (Mont. 1952); Begay vs Sawtelle, 53 Ariz. 304, 88 P.2d 999 (1939); *Bradley vs Arizona Corp. Commission,* 60 Ariz. 508, 141 P.2d 524 (1934); *Harrison vs LaVeen,* 67 Ariz. 337, 196 P.2d 456 (1948); *Paiz vs Hughes,* 76 N. Mex. 562, 417 P.2d 51 (1966). *Smith vs Temple,* 82 S.D. 650, 152 N.W.2d 547, 548 (1967).

These decisions whether expressly or implicitely ruled upon those respective states "disclaimer clause" in their enabling act. It should be noted that the enabling legislation for Statehood for North Dakota (Act of Feb. 22, 1889, ch. 180, 25 Stat. 676) has the identical language of all of the States which have ruled upon this question. *See* Act of Feb. 22, 1889, ch. 180, 4 Stat 676 (South Dakota, Washington and Montana); Act of June 20, 1910, ch. 310, §20, 36 Stat. 557 (Arizona); Act of June 20, 1910, ch. 310 § 2, 36 Stat 557 (New Mexico); Act of July 16, 1894, ch. 138, §3, 28 Stat. 107 (Utah). This Court in McClanahan discussed the Arizona Enabling Act.

The North Dakota Supreme Court relied upon its interpretation of the States enabling act and Constitutional provision, §203, N.D. *Const., as amended* in the *Three Affiliated Tribes, supra* decision. Since the enabling legislation of the various states who have ruled on this issue are identical the constitutional provisions may be the only difference. In 1958, as the Court below stated, North Dakota amended its constitution to read as follows:

> "The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits

> owned or held by any Indian or Indian Tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, provided, however, that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress;..."

In 1963 the legislature enacted N.D.C.C ch. 27-19 permitting jurisdiction in state court over matters arising on the Reservation involving Indians "upon acceptance by Indian citizens". N.D.C.C. § 27-19-01. Even though the enabling legislation should be no barrier to access to State Courts in this case, North Dakota has removed any, even remote, impediment.

The Court below based its decision on the fact that the IRCA as interpreted in *Kennerly vs District Court,* 400 U.S. 423 (1971) and N.D.C.C. § 27-19-01 requiring a majority vote of the adult members of the Tribe before acceptance of State jurisdiction is permitted. Reliance upon *Kennerly, supra* was misguided because it involved an Indian defendant being brought into State Court, a situation 25 U.S.C § 1322 (2) was intended to prevent.

The very limited legislative history of 25 U.S.C. § 1322 (a) indicates that Congress was primarily concerned with the foisting of state jurisdiction under P.L. 280 upon individual Indians, the violation of Indian rights by federal, state and local governments, and the lack of consent by the tribal governments. *See hearing on Constitutional Rights of the American Indian Before the Subcommittee on Constitutional Rights of the Senate Comm. on the Judiciary,* 87th Cong., 2d Sess., pt 3, 143, at 769 (1962), (hereafter Senate hearings); *Senate hearings* 86th *Cong.,* 1st Sess. pt 1, at 224 (1961); *See also* 114 **Cong. Rec.** 5838 (1968); *Wounded Head vs Tribal Council,* 507 F.2d 1079, 1082 (8th Cir. 1975). *Poitra vs Demarrias,* 502 F2d 23, 29

(8th Cir, 1974), *cert denied* 421 U.S. 934. No concern was expressed upon voluntary action by Indians to utilize state courts only the involuntary foisting of such courts upon them.

Furthermore, the intent of the ICRA was to protect individual Indians. 24 U.S.C. § 1322 (a). Thus, there is no conflict with a "governing act of Congress". Since there is no "governing act of Congress", the question is, under *Williams vs Lee, supra,* whether bringing the action in State Court infringes upon Tribal self-government. Since there is no foisting of jurisdiction and the fact that the Tribe itself is bringing the action there can be no interference of Tribal self-government.

Also, federal pre-emption analysis traditionally has been used only where affirmative conduct by the State, derived from state statutory or regulatory enactments, which had interferred with Tribal self-government or rights granted or reserved pursuant to federal law. *E.g., Mescalero Apache Tribe vs Jones,* 411 U.S. 145, 148 (1973) (imposition of State use and gross receipts taxes on off reservation tribal ski resort); *Moe vs Confederated Salish and Kootenai Tribes,* 425 U.S. 463 (1976) (imposition of State Personal Property Tax, Vendor License Fee and Cigarette Sales Tax); *McClanahan, supra* (imposition of State Tax on personal income exclusively derived from reservation sources). *See generally, Jones vs Rath Packing Co.,* 430 U.S. 519 (1977). This approach to federal preemption is entirely on tract with the policy established in *People vs Dibble,* 62 [21 How.] U.S. 366 (1858). In *Dibble* this Court ruled that a state statute passed for the benefit and protection of Indians was not in conflict with the guardian/ward relationship between Reservation Indians and the Federal Government; nor was it pre-empted by the 1802 Intercourse Act, Act of March 30, 1802 (2 U.S.L. 139). The action taken by the North Dakota Courts is not to the benefit of Reservation Indians and is based solely upon the States interpretation of federal law.

Furthermore, to deny access to State Courts by Indian Plaintiffs is contrary to the policy that

> statutes passed for the benefit of dependent Indian Tribes....are to be liberally construed, doubtful ex-

pressions being resolved in favor of the Indians.

Bryan vs Itasca County, 426 U.S. 373, 392 (1976). The ICRA was passed for the benefit of individual Reservation Indians and Tribal governments. The action below denies them a right not expressly pre-empted in the Act. Therefore, statutory interpretation mandates that the access to State Courts in this case not be denied.

In *Bryan, supra,* this Court acknowledged residual jurisdiction in the State over Indian matters upon the following condition:

> In litigation between Indians and Non-Indians arising out of conduct on an Indian Reservation, resolution of conflicts between the Jurisdiction of the State and Tribal Courts has dependence, absent a governing Act of Congress, on "whether the State action infringed on the right of Reservation Indians to make their own laws and be ruled by them.

Id. at 386, *quoting Williams, supra* at 220. See also *Mescelero Apache Tribe, supra* at 1270. The key to this phrase is the requirement for state actions. There is no state action involved in this case. Nor does the matter infringe upon any tribal laws. The Three Affiliated Tribes have declined jurisdiction over Non-Indians:

> *Jurisdiction.* The Fort Berthold Indian Court shall have jurisdiction of all suits wherein the defendant is a member of the Three Affiliated Tribes or an Indian over whom the Court has jurisdiction, and of all other suits between members and non-members brought before the Court by stipulation of the parties.

Three Affiliated Tribes' Tribal Code, Ch II §1 (a).

In fact, all Courts deciding this issue including this Court in *Felix, supra* and *Candelaria, supra* do not appear to be products of this Court's concern with problems of State power over reservation and modification of *Worcester* principles, but rather with the fact that State courts are, by their State Constitutions open to all persons for redress of grievances and Indians are persons. N.D. *Const.* Artl I, § 9 mandates:

> "All courts shall be open, and every man for any injury done him in his lands, goods, person or reputation shall have remedy by due process of law and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct."

N.D. *Const.* Art. I, § 9 and the Fourteenth Amendment to the United States Constitution present a substantial barrier to denial of Court access to Indian Plaintiffs when the defendant is not an Indian. Access to Courts to settle disputes where there is no other remedy has been constitutionally protected by this Court. *See Boddie vs Connecticut,* 401 U.S. 371 (1970).

CONCLUSION

There are compelling reason why the petition for a Writ of Certiorai should be granted. The lack of an adequate forum for Reservation Indians to litigate matters arising on the reservation in their dealings with ousiders is very real. The denial of access to a Court system because of Indian status smacks in the face of the long history of Judicial protection of Reservation Indians.

Finally, no where can there be found support for the North Dakota Supreme Court's decisions. Every Court that has decided this issue, taken the liberty of posit dictum of the policy of acceptance of cases for review has taken the informed and proper position that Indians have access to State Courts to sue Non-Indians.

Dated: September, 1982.

Respectfully submitted,

John O. Holm
Attorney for Petitioners
17 Second Avenue West
Dickinson, North Dakota 58601

APPENDIX

APPENDIX A

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF WARD ss NW JUDICIAL DISTRICT

Three Affiliated Tribes of the Fort Berthold Reservation, Plaintiff,

vs.

Wold Engineering, P.C., a North Dakota Professional Corporation, Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush, Third-Party Defendant.

JUDGMENT OF DISMISSAL

Civil No. 46392

The Defendant Wold Engineering, P.C.'s Motion for Dismissal of the above entitled matter having been granted by the Court, and the Court having made its order for Judgment of Dismissal, now therefore,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the above entitled action be in all things dismissed, such dismissal to be without prejudice on the part of the Plaintiff to proceed further upon compliance by the Plaintiff with the appropriate statutes relating to jurisdiction of this matter.

Dated at Minot, North Dakota, this 18th day of January 1982.

/s/ _____

Clerk of District Court

APPENDIX B

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF WARD ss NW JUDICIAL DISTRICT

Three Affiliated Tribes of the Fort Berthold Reservation, Plaintiff,

vs.

Wold Engineering, P.C., a North Dakota Professional Corporation, Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush, Third-Party Defendant.

NOTICE OF APPEAL

Civil No. 46392

Please take notice that the above name Plaintiff, Three Affiliated Tribes of the Fort Berthold Reservation, by and through its attorney, John O. Holm, of Dickinson, North Dakota, does hereby take appeal from the Judgment of Dismissal from the District Court of and for Ward County of the Northwest Judicial District, dated January, 18, 1982.

That this appeal is hereby taken to the North Dakota Supreme Court.

That also it is the intention of the appellant not to request any transcripts in this matter due to the fact that any hearings or transcripts involved in this case do not relate to the subject matter of the Dismissal which was jurisdictional.

Dated this 22nd day of February, 1982.

BEYER & HOLM LAW OFFICES
17 Second Avenue West
Dickinson, North Dakota 58601
Attorneys for the Plaintiff

/s/ _____
John O. Holm

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Plaintiff and Appellant,

v.

WOLD ENGINEERING, P.C., a North Dakota Professional Corporation, Defendant, Third-Party Plaintiff, and Appellee,

v.

SCHMIDT, SMITH & RUSH, Third-Party Defendant and Appellee.

Civ. No. 10172.

Supreme Court of North Dakota

July 1, 1982.

Indian tribe brought action against non-Indian engineering firm for negligence in the design and construction of a water system for an Indian village located entirely within exterior boundary of Indian reservation. The District Court, Ward County, Northwest Judicial District, Wallace D. Berning, J., dismissed the complaint for lact of subject-matter jurisdiction, and tribe appealed. The Supreme Court, Erickstad, C. J., held that state district court was without jurisdiction over Indian tribe's complaint where Indian citizens of reservation had not voted to accept jurisdiction.

Affirmed.

1. Indians 27(2)

State district court lacked jurisdiction over Indian tribe's action against non-Indian engineering firm for negligence in design and construction of water system for Indian village located entirely within exterior boundary of Indian reservation where Indian citizens of reservation had not voted to accept jurisdiction of state courts, NDCC 27-19-01 et seq.; Indian Civil Rights Act of 1968, § 201 et seq., 25 U.S.C.A. § 1301 et seq.; Act August 15, 1953, § 1 et seq., 67 Stat. 588; Const. 1889, Art. 16, § 203.

2. Constitutional Law 249(1), 328

Denying Indians access to state court to sue non-Indians for civil causes of action arising on reservation did not deny Indians equal access to courts and equal protection rights where state constitutional and statutory provisions requiring Indians to consent to state court jurisdiction were enacted under explicit congressional authority. NDCC 27-19-01 et seq.; Indian Civil Rights Act of 1968, § 201 et seq., 25 U.S.C.A. § 1301 et seq.; Act August 15, 1953, § et seq., 67 Stat. 588; Const. 1889, Art. 16, § 203; Const. Art. 1, § 21; U.S.C.A. Const. Amend. 14.

Beyer & Holm Law Offices, Dickinson, for plaintiff and appellant; argued by John O. Holm, Dickinson

Bosard, McCutcheon & Rau by Hugh McCutcheon, Minot for defendant, third-party plaintiff, and appellee; argued by Gary H. Lee, Bismarck.

Pringle & Herigstad, Minot, for third-party defendant and appellee.

ERICKSTAD, Chief Justice

Three Affiliated Tribes of the Fort Berthold Indian Reservation (Affiliated) appealed from a judgment of the District Court of Ward County dismissing the complaint for lack of subject matter jurisdiction. The sole issue on appeal is whether or not the State court has subject matter jurisdiction over a civil action arising with the exterior boundaries of the Fort Berthold Indian Reservation in which Affiliated is the plaintiff and the defendants are non-Indians. The trial court held it had no jurisdiction. We affirm.

Affiliated contracted with Wold Engineering for the design and construction of a water system for the Four Bears Village. For purposes of our discussion, Affiliated is an Indian tribe. The Four Bears Village is located entirely within the exterior boundary of the Fort Berthold Indian Reservation. The enrolled residents of the Fort Berthold Indian Reservation have not consented to assumption of civil jurisdiction by the state of North Dakota, pursuant to the Indian Civil Rights Act of 1968 and

Chapter 27-19 of the North Dakota Century Code.

After the construction and installation of the water system, Affilated brought suit against Wold Engineering, claiming Wold negligently designed the water system.

[1] Affiliated has thoroughly briefed and outlined a historical perspective of Indian law in the United States. Essentially, its argument is that the state of North Dakota had limited jurisdiction to hear civil actions involving Indians on the Indian Reservation prior to Congress's enactment of Public Law 280 in 1953 and the amendment of that Act by Congress in 1968 through the Indian Civil Rights Act. The purpose of Public Law 280 was to facilitate the transfer of jurisdictional responsibility to the state. *Washington v. Confederated Bands and Tribes,* 439 U.S. 463, 505, 99 S.Ct. 740, 764, 58 L.Ed.2d 740 (1979). It permitted states to amend their constitutions or existing statutes to removed any legal impediments to the assumption of civil and criminal jurisdiction, and thereby to unilaterally assume jurisdiction over criminal and civil matters within the exterior boundaries of Indian reservations within the states taking such action. In 1968, however, with the enactment of the Indian Civil Rights Act, Congress amended Public Law 280 to permit states to take jurisdiction only upon bilateral action. Congress now permits those states which did not previously acquire jurisdiction to assume jurisdiction only upon consent of the affected Indian tribes.

Affiliated argues that under the Congressional scheme states retained the jurisdiction held before the enactment of Public Law 280 and the Indian Civil Rights Act of 1968. In essence, Affiliated argues that North Dakota retained residuary jurisdiction over actions brought by Indians against non-Indians for civil wrongs committed on Indian lands. *See, State ex rel. Iron Bear v. District Court,* 162 Mont. 335, 512 P.2d 1292 (1973). That argument would be more convincing had the legislature of North Dakota not, pursuant to Public Law 280, totally disclaimed jurisdiction over civil causes of action arising on an Indian reservation. *In re Whiteshield,* 124 N.W.2d 694 (N.D. 1963). In *Nelson v. Dubois,* 232 N.W.2d 54 (N.D. 1975),

with Justice Vogel dissenting, we rejected the concept of "residuary" jurisdiction. We adhere to that decision today.

In tracing the history of North Dakota's Indian civil jurisdiction we start with the Congressional Enabling Act, passed February 22, 1889, providing for the establishment of the states of Montana, North Dakota, South Dakota and Washington. Section 4, subdivision 2, of that Act provided that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." That section was incorporated into the original North Dakota Constitution as a "Compact with the United States." Art. XVI, § 203 N.D. Const. (1889).

In *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957), this Court said that the contract between the United States and North Dakota created by Section 4, subdivision 2, of the Enabling Act and the disclaimer in Section 203 of the North Dakota Constitution, did not constitute a reservation by the United States of exclusive jurisdiction over civil causes of action between Indians residing on the reservation, if the actions did not involve the lands. Further, this Court said Public Law 280 had no application to states such as North Dakota which had assumed and exercised jurisdiction prior to the enactment of Public Law 280.

Under the authority of Public Law 280 the people of North Dakota in 1958 approved an amendment of Section 203 of the North Dakota Constitution which reads:

> "The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said *Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, provided, however, that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the*

> *acceptance of such jurisdiction as may be delegated to the state by Act of Congress,....*" Article XIII, § 1, N.D. Const. (Emphasis added).

In 1963 the North Dakota Legislature, under the authority of Public Law 280 and the Constitutional amendment to Section 203, enacted Chapter 27-19, N.D.C.C. That chapter permits state court's to take jurisdiction over "all civil causes of action which arise on an Indian reservation upon acceptance [of such jurisdiction] by Indian citizens...." § 27-19-01, N.D.C.C.

Because of the constitutional amendment and the enactment of Chapter 27-19, N.D.C.C., we overruled *Vermillion v. Spotted Elk,* 85 N.W.2d 432 (N.D. 1957), in *In re Whiteshield,* 124 N.W.2d 694 (N.D. 1963). We said the jurisdiction found in *Spotted Elk* was disclaimed by the people and the legislature of the state:

> "However, by the amendment of Section 203 of the North Dakota Constitution in 1958, and the passage of Chapter 242 of the Session Laws of 1963, the people and the legislature of the State have taken affirmative action which amounts to a complete disclaimer of jurisdiction over civil causes of action which arise on on Indian reservation, except upon acceptance by the Indian citizens of the reservation in the manner provided by the legislative enactment." *In re Whiteshield,* 124 N.W.2d at 696.

Since *In re Whiteshield,* we have consistently held that we have no jurisdiction over civil causes of action arising within the exterior boundaries of an Indian reservation, unless the Indian citizens of the reservation vote to accept jurisdiction. *United States ex rel. Hall v. Hansen,* 303 N.W.2d 349 (N.D. 1981); *Nelson v. Dubois,* 232 N.W.2d 54 (N.D. 1975); *Gourneau v. Smith,* 207 N.W.2d 256 (N.D. 1973).[1] We therefore hold that the district court lacked jurisdiction to hear this action.

1. Affiliated argues that the dicta in *Rolette County v. Eltobgi,* 221 N.W.2d 645, 648 (N.D. 1974) stating that "Indians have the right to sue non-Indians in State Courts" is controlling in this action. However, such right does not exist where the subject matter of the action arose within the exterior boundaries of a reservation.

[2] Affiliated argues that denying Indians access to State court to sue non-Indians for civil causes of action arising on the reservation denies them equal access to the courts and their equal protection rights under Art. 1, Section 21 of the North Dakota Constitution and the Fourteenth Amendment to the United States Constitution, because non-Indian plaintiffs, allegedly are permitted access to State courts to sue non-Indian defendants over controversies arising within the exterior boundaries of Indian reservations.

In *Gourneau v. Smith,* 207 N.W.2d 256, 259 (N.D. 1973), we affirmed the trial court's judgment dismissing the plaintiff's complaint for lack of subject matter jurisdiction because the parties to the action were Indians. On appeal, the Indian plaintiff argued that she was denied equal protection of the laws because of the state's failure to hear her action. In response speaking through Justice Strutz we said:

> "The plaintiff has the same privileges as any other citizens in maintaining suits in the courts of this State. If the plaintiff were not an Indian and she attempted to bring an action against a defendant who was an enrolled Indian for personal injuries which she alleged had been suffered in an accident occurring on the Indian reservation, the State courts nevertheless would be without jurisdiction. *Williams v. Lee,* 358 U.S. 217,79 S.Ct. 269, 3 L.Ed.2d 251 (1959). Thus the plaintiff is not denied her right to bring such action in the State courts because she is an Indian; she is denied the right because the alleged tort was committed by an Indian on an Indian reservation, and because the Indians on that reservation have not accepted State jurisdiction in the manner provided for such acceptance. Neither is denial of acces to State courts for certain claims an infringement of the plaintiff's constitutional rights under Section 22 of the North Dakota Constitution. The Courts of this State are not at liberty to exercise jursidiction over civil actions against an Indian where the cause of action arises on the reservation. *Williams v. Lee, supra.*" 207 N.W.2d at 259.

The United States Supreme Court addressed the equal

protection argument in *Washington v. Confederated Bands and Tribes,* 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979). In *Confederated Bands,* the Court upheld Chapter 36 of the 1963 Washington laws against constitutional attack. Through that law, "the Washington Legislature obligated the state to assume civil and criminal jurisdiction over Indians and Indian territory within the state, subject only to the condition that in all but eight subject-matter areas jurisdiction would not extend to Indians on trust or restricted lands without the request of the Indian tribe affected. Ch. 36, 1963 Wash. Laws." (Footnote omitted). *Id.,* 439 U.S. at 465-467, 99 S.Ct. at 743-44. The Court first held that the scheme adopted by the Washington Legislature was within the scope of the authorization of Public Law 280. It then addressed the equal protection argument as follows:

> "It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. *Morton v. Mancari,* 417 U.S. 535, 551-552, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as we have found, within the scope of the authorization of Pub.L. 280. And many of the classifications made by Chapter 36 are also made by Pub.L. 280. Indeed, classification based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States, see, *e.g., United States v. McBratney,* 104 U.S. 621, 26 L.Ed. 869. For these reasons, we find the argument that such classifications are 'suspect' an untenable one. The contention that Chapter 36 abridges a 'fundamental right' is also untenable. It is well established that Congress, is the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes.

See, *e.g.*, *United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303. In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power." *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 500-01, 99 S.Ct. 740, 761, 58 L.Ed.2d 740 (1979).

Likewise, the people of North Dakota and the legislature were acting under explicit authority granted by Congress in the exercise of its fedral power over Indians when our Constitution was amended and Chapter 27-19, N.D.C.C., was enacted. We therefore find no equal protection violation of the Constitution of either the state or the United States and for the reasons stated in this opinion, affirm the judgment of the district court.

VANDE WALLE, PEDERSON, PAULSON AND SAND, JJ., concur.

THIS PAGE INTENTIONALLY
LEFT BLANK

Office - Supreme Court, U.S.
FILED
JUL 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-629

In The

Supreme Court of the United States

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P. C., A NORTH DAKOTA PROFESSIONAL CORPORATION,
Respondent,

vs.

SCHMIDT, SMITH & RUSH,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

JOINT APPENDIX

JOHN O. HOLM
17 Second Avenue West
Dickinson, North Dakota
58601
(701) 225-6066
Counsel for Petitioner

HUGH McCUTCHEON
P.O. Box 939
Minot, North Dakota
58701
(701) 842-3578
Counsel for Respondent Wold Engineering, P.C.

JAN M. SEBBY
P.O. Box 1000
Minot, North Dakota
58701
(701) 852-0381
Counsel for Respondent Schmidt, Smith & Rush

PETITION FOR CERTIORARI FILED SEPTEMBER 28, 1982
CERTIORARI GRANTED APRIL 25, 1983

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

	Pages
Complaint (Petitioner)	1
Answer and Counterclaim (Respondent, Wold Engineering, P. C.)	4
Answer to Counterclaim (Petitioner)	8
Third-Party Complaint (Respondent, Wold Engineering, P. C.)	9
Third-Party Answer (Respondent, Schmidt, Smith & Rush)	14
Order Dismissing Third-Party Complaint and Granting Summary Judgment	16
Memorandum Opinion	18
Judgment of Dismissal (See, Petition for Writ at 1)	
Notice of Appeal to North Dakota Supreme Court (See, Petition for Writ at 2)	
North Dakota Supreme Court Decision (See, Petition for Writ at 3)	

List of Relevant Docket Entries

	Date Filed
1. Summons and Complaint	April 7, 1980
2. Answer and Counterclaim	May 21, 1980
3. Answer to Defendant's Counterclaim	May 22, 1980
4. Note of Issue to the Court	May 22, 1980
5. Third Party Summons and Complaint	May 28, 1980
6. Separate Answer of Third Party Defendant Acton Construction, Co.	June 12, 1980
7. Answer of Third Party Defendant Schmidt, et al	Aug. 14, 1980
8. Motion to Dismiss, Motion for Summary Judgment by Third Party Defendant Acton Construction, Co.	Sept. 17, 1980
9. Order Dismissing Third Party Complaint	Oct. 1, 1981
10. Motion of Defendant to Dismiss for Lack of Jurisdiction	Jan. 12, 1982
11. Memorandum Opinion Granting Motion to Dismiss	Jan. 12, 1982
12. Judgment of Dismissal	Jan. 18, 1982
13. Notice of Entry of Judgment	Jan. 19, 1982
14. Notice of Appeal	Feb. 23, 1982
15. North Dakota Supreme Court's Decision Affirming Judgment of Dismissal	July 1, 1982
16. Filing of Petition for Certiorari	Sept. 28, 1982
17. Solicitor Invited to File Brief	Nov. 29, 1982
18. Petition for a Writ of Certiorari Granted	April 25, 1983

No. 82-629

In The

Supreme Court of the United States

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,

Petitioner,

vs.

WOLD ENGINEERING, P. C., A NORTH DAKOTA PROFESSIONAL CORPORATION,

Respondent,

vs.

SCHMIDT, SMITH & RUSH,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

JOINT APPENDIX

IN DISTRICT COURT

NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD

Three Affiliated Tribes of the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P.C., a North Dakota Professional Corp.,

Defendant.

COMPLAINT

Case #

JURISDICTION

I.

Defendant is a Professional Corporation doing business within the State of North Dakota and organized under the Laws of the State of North Dakota.

———o———

STATEMENT OF CASE

II.

That the Plaintiff contracted with Defendant to provide Plaintiff with expert Engineering services for the construction of a year around water intake facility from Lake Sakakawea for the 4-Bears Village.

III.

That the water intake system designed by Defendant is not fit nor functional for the purposes and location intended.

IV.

That Defendant was negligent and incompetent in the designing of a year round water intake system.

V.

That because of Defendant's negligence and faulty design the water intake system has frozen up and has not functioned for each of the first three winters of its exist-

ence, namely the winters of 1977-1978, 1978-1979, and 1079 (sic) -1980.

VI.

That because of the freezing up of the water intake system Plaintiff's (sic) have been without water for considerable lengths of time and with raw unhealthy water supplies for the combined winter months of 1977-1978, 1978-1979, and 1979-1980.

VII.

That to convert the water intake system to a year around facility would cost $350,000.00.

VIII.

That Plaintiffs have paid the sum of $75,000.00 to rehabilitate the system to keep it functioning.

WHEREFORE, PLAINTIFF PRAYS THIS COURT TO GRANT:

1. This Court to grant a judgment against Defendant in the sum of $425,000.00 together with costs, disbursements and reasonable attorneys fees.

Dated this 20th day of March, 1980.

JOHN O. HOLM
Attorney for Plaintiff
17 Second Ave. West
Dickinson, North Dakota 58601

.....

John O. Holm

Civil No. ——

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD ss

Three Affiliated Tribes of
the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., a
North Dakota Professional Corp.,

Defendant.

ANSWER AND COUNTERCLAIM

NOW COMES the Defendant Wold Engineering, P. C., and for its answer to the Plaintiff's Complaint, alleges:

1.

That the Complaint fails to state a claim against this Defendant upon which relief can be granted.

2.

Except as hereinafter admitted, modified, qualified or explained, this answering Defendant, Wold Engineering, P. C., denies all of the allegations of the Complaint.

3.

Admit Paragraphs I and II of the Complaint.

4.

Deny Paragraphs III, IV, V and VI of the Complaint.

5.

Deny that this answering Defendant has knowledge or information sufficient to form a belief as to the truth of Paragraph VII of the Complaint, and therefore denies the same; alleges that such allegation is a conclusion on the part of the pleader, is not germane to and is without and beyond the gravamen of the complaint; is not a valid and proper measure of damage with respect to the alleged cause of action set forth in the Complaint.

6.

With respect to Paragraph VIII of the Complaint, these Defendants deny that they have knowledge or belief sufficient to form a belief as to the truth of the same, and therefore deny the same; further allege that if the said Plaintiffs have expended any sum as alleged in said paragraph for such rehabilitation, any and all events which caused or required such rehabilitation were not caused by any act or omission on the part of this Defendant, but were caused by others over whom this Defendant had and has no control; that the Plaintiff wholly failed to guard against any acts of others which may have caused, or led to, any damage to any of said installation; that the Plaintiff wholly failed in any manner whatsoever to take adequate and sufficient steps and precautions to protect the installation, and any damage to such installation caused by the acts of others were due proximately to the carelessness and negligence of the Plaintiffs in failing to protect such installation.

7.

Further answering, this Defendant specifically denies that this answering Defendant was in any way, either by commission or omission, negligent with respect to any design work which this Defendant did with respect to the structure described in the Complaint; that the plans and specifications as prepared by this Defendant were in all things proper and correct for the scope of the project to be undertaken according to the instructions of the Plaintiff and the design of this answering Defendant was in no manner whatsoever defective. Further, this answering Defendant alleges that the damages complained of by the Plaintiff, if in fact sustained by the Plaintiff, were caused by acts or omissions of others over whom this Defendant had no authority or control, and were caused by the wilful carelessness and negligence on the part of the Plaintiff in protecting the completed installation.

COUNTERCLAIM

FURTHER ANSWERING, and as and (sic) for a counterclaim against the Plaintiff, this Defendant alleges that the Plaintiff owes to the Defendant the sum of Four Thousand Five Hundred Dollars ($4,500.00) as the balance due on the engineering fees due this Defendant from the Plaintiff with respect to the engineering services performed by this Defendant in connection with the construction of the structure set forth in the Plaintiff's Complaint, no part of which balance due has been paid to this Defendant, even though these Defendants have demanded the same from the Plaintiff who refused to pay.

WHEREFORE, this answering Defendant prays the Court that the Plaintiff take nothing in the above entitled action and that the Plaintiff's action be dismissed; that this answering Defendant have judgment against the Plaintiff in the sum of Four Thousand Five Hundred Dollars ($4,500.00) as prayed for in this Defendant's Counterclaim, together with interest thereon, and that this answering Defendant have its costs and disbursements, and such other relief as to the Court may seem just.

Dated at Minot, North Dakota, this 15th day of May, 1980.

BOSARD, McCUTCHEON, HOLUM & RAU, LTD.
Attorneys for Defendant
200 Heritage Place
P. O. Box 939
Minot, North Dakota 58701

BY: /s/ Hugh McCutcheon

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD

Three Affiliated Tribes of
the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., a
North Dakota Professional Corp.,

Defendant.

ANSWER TO DEFENDANT'S COUNTERCLAIM

NOW COMES the above-named Plaintiff and for their ANSWER to Defendant's Counterclaim and states it denies each and every allegation contained in the Defendant's Counterclaim.

WHEREFORE, Plaintiff prays that Defendant's Counterclaim be dismissed with prejudice and costs and attorneys fees for Plaintiff and any other relief the Court deems necessary and just.

Dated this 21st day of May, 1980, Dickinson, North Dakota.

/s/ John O. Holm
Attorney for Plaintiff
17 2nd Ave W.
Dickinson, N. D. 58601

Civil No. 46392

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD ss

Three Affiliated Tribes of
the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C.,
a North Dakota Professional Corporation,

Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush and Acton Construction Co., Inc.,

Third-Party Defendants.

THIRD-PARTY COMPLAINT

The above named Defendant and Third-Party Plaintiff, by its attorneys, as and for a Third-Party Complaint against the Third-Party Defendants, alleges:

I.

Plaintiff, Three Affiliated Tribes of the Fort Berthold Reservation, has filed against the Defendant, Wold Engineering, P. C., a North Dakota Professional Corporation, a Complaint, a copy of which is attached hereto as Exhibit "A".

II.

As appears from the Complaint, the Plaintiff alleges that the Plaintiff contracted with the Defendant to pro-

vide Plaintiff with expert engineering services for the construction of a year round water intake facility from Lake Sakakawea for the Four Bears Village; that the water intake system desig ·ed by the Defendant is not fit nor functional for the purposes and location intended; that Defendant was negligent and incompetent in the designing of a year round water intake system; that the system has frozen up and not functioned for each of the first three winters of its existence, namely the winters of 1977-1978, 1978-1979, and 1079 (sic) -1980. It is further alleged in said Complaint that by virtue of freezing up of the water intake system the Plaintiff has been without water for a considerable length of time, and with raw, unhealthy water supplies for the winter months of 1977 through 1980. It is further alleged in said Complaint that Plaintiff has paid the sum of Seventy-five Thousand Dollars ($75,000.00) to rehabilitate the system to keep it functioning, and that to convert the water intake system to a year round facility would cost Three Hundred Fifty Thousand Dollars ($350,-000.00).

The Defendant and Third-Party Plaintiff has, among other things, denied the allegations of the Plaintiff's Complaint.

III.

That the Defendan'. Schmidt, Smith & Rush, was employed by the Defendant, Wold Engineering, P. C., for the purpose of preparing design, plans and specifications for all of the electrical and heating work required with respect to the project described in the Complaint, which design was intended to keep said water intake system from freezing during winter months; that it was the duty of the

said Third-Party Defendant, Schmidt, Smith & Rush, to use due care in its design of the electrical and heating system, and to specify good and proper equipment for the ordinary purposes for which such equipment was intended, and that such duty ran to the Third-Party Plaintiff and to any and all other parties who would use and rely upon the design and equipment so specified. That this Defendant and Third-Party Plaintiff followed and relied upon the skill of the said Third-Party Defendant, Schmidt, Smith & Rush, in said design and equipment specifications, and that the Third-Party Defendant, Schmidt, Smith & Rush, breached its duty to this Defendant and Third-Party Plaintiff in that the said Third-Party Defendant, Schmidt, Smith & Rush, was careless and negligent in that the design and specifications which it provided to the Third-Party Plaintiff were insufficient and defective and did not meet the purpose for which such design was intended.

IV.

That the Third-Party Defendant, Acton Construction Co., Inc., entered into a contract with the Plaintiff to furnish all of the materials, supplies, machinery, equipment, tools, superintendence, labor, and other accessories and services necessary to complete the said project referred to in the Complaint in accordance with the conditions and prices stated in the Proposal, the General Conditions, Supplemental General Conditions and Special Conditions of the Contract, including all maps, plats, blueprints and other drawings and printed or written explanatory matter thereof, all of which were made part of the contract; that the said Third-Party Defendant, Acton Con-

struction Co., Inc., wholly failed to keep said project in repair as required by the contract and within the time therein provided; that if any materials in said project were defective, the same were supplied by the said Third-Party Defendant, Acton Construction Co., Inc., and for which said contractor is liable to the Plaintiff; that the said contractor in attempting to repair work performed by the contractor negligently delayed the performance thereof, and that such negligent delay was a proximate cause of the damage sustained by the Plaintiff; that the said Third-Party Defendant, Acton Construction Co., Inc., or its subcontractors, failed to comply in all things with the contract provisions, the plans and specifications, general conditions and special conditions and that such contractor furnished faulty equipment and defective workmanship in the performance of its contract.

V.

In the event that the Plaintiff should recover any damage from the Defendant and Third-Party Plaintiff for damages as alleged in the Complaint, then the Defendant and Third-Party Plaintiff is entitled to full indemnity and/or contribution from the said Third-Party Defendants.

WHEREFORE, Wold Engineering, P. C., Defendant and Third-Party Plaintiff, demands judgment against the Third-Party Defendants for all sums by way of indemnity and/or contribution that may be adjudged against it in favor of the Plaintiff, together with costs and disbursements herein and such other and further relief as the Court may deem just and equitable.

Dated at Minot, North Dakota, this 20th day of May, 1980.

BOSARD, McCUTCHEON, HOLUM & RAU, LTD.

Attorneys for Defendant and Third-Party Plaintiff, Wold Engineering, P. C.
200 Heritage Place
P. O. Box 939
Minot, North Dakota 58701

By: /s/ Hugh McCutcheon

Civil No. 46392

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD ss

Three Affiliated Tribes of
the Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., a North Dakota
Professional Corporation,

Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush and Acton Construction Co., Inc.,

Third-Party Defendants.

ANSWER OF THIRD-PARTY DEFENDANT
SCHMIDT, SMITH & RUSH

I.

Schmidt, Smith & Rush, Inc. denies all the allegations of the Complaint and of the Third-Party Complaint, except as herein expressly admitted, qualified or explained.

II.

Responding to paragraph 3 of the Third-Party Complaint, Schmidt, Smith & Rush admits that it was employed by the Defendant, Wold Engineering, P. C. for the purpose of designing and preparing plans and specifications

for electrical and heating work required with respect to the project described in the complaint.

III.

Schmidt, Smith & Rush denies that it was careless and negligent and denies that its design and specifications were insufficient and defective.

DATED at Minot, North Dakota, this 12th day of August, 1980.

PRINGLE & HERIGSTAD, P. C.
/s/ Jan M. Sebby
Attorney for the Third-Party Defendants
Box 1000
Minot, ND 58701

Civil No. 46392

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD

Three Affiliated Tribes of the
Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., A North Dakota
Professional Corporation,

Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith & Rush and Acton Construction Co., Inc.,

Third-Party Defendants.

ORDER DISMISSING THIRD-PARTY COMPLAINT
AND GRANTING SUMMARY JUDGMENT

The Third-Party Defendant, Acton Construction Co., Inc., (Acton) having moved for dismissal of the Third-party Complaint against it; for a Summary Judgment in its favor; and alternatively, for separate trial; and Acton having served and filed said Motions and accompanying Affidavit and Brief as required by Rule 2.2(c) of the North Dakota Rules of Court; and the time for file of Answer Briefs having expired; said Motions are therefore deemed submitted and taken under advisement by the Court; and, pursuant to Rule 3.2(d) of the Rules of Court, failure to file a Brief by an adverse party being an admission that, in the opinion of counsel, that the motions are meri-

torious; and the Court having examined the Pleadings and other documents and records filed herein; and the Court being fully advised in the premises:

The Court finds that the Third-Party Complaint fails to show any liability of Third-Party Defendant Acton to Third-Party Plaintiff for any relief that might be granted under Plaintiff's claim for relief in the main action.

The Court finds that there is no genuine issue as to any material fact in the Third-Party action against Acton and that Acton is entitled to Judgment as a matter of law.

THEREFORE, IT IS ORDERED

1. That the Motion to Dismiss be and is granted and the Third-Party Complaint against Acton Construction Co., Inc., be and is stricken for failure to state a claim.

2. That Third-Party Defendant, Acton Construction Co., Inc.'s, Motion for Summary Judgment be, and it hereby is, granted.

3. That the Clerk of this Court enter a Judgment dismissing the Third-Party Complaint against Acton Construction Co., Inc., with prejudice, and awarding Acton its costs and disbursements against the Third-Party Plaintiff.

4. That the Motion for separate trial is denied.

DATED this 12th day of October, A. D., 1981.

/s/ Wallace D. Berning,
Judge of the District Court

Civil No. 46392

IN DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

STATE OF NORTH DAKOTA
COUNTY OF WARD

Three Affiliated Tribes of the
Fort Berthold Reservation,

Plaintiff,

vs.

Wold Engineering, P. C., a North Dakota
Professional Corporation,

Defendant and Third-Party Plaintiff,

vs.

Schmidt, Smith and Rush,

Third-Party Defendants.

MEMORANDUM OPINION

FACTS

The Plaintiff seeks to recover from the Defendants for defective workmanship on a project within the Fort Berthold Indian Reservation. The action is based upon alleged negligence. At the commencement of trial proceedings, the Defendant, Wold Engineering, submitted a Motion to Dismiss for Lack of Jurisdiction, citing the provisions of 25 U. S. C. §§ 1322 and 1326 and 27-19-01 NDCC. It was stipulated by both parties that a tribal election was not held to ratify the proceedings in this case. The Plaintiff resists the Motion contending that it was not the intention of the Indian Civil Rights Act to apply to tribal

governments such as the Plaintiff. The Court, after considering the Motion, recessed the trial and invited briefs from parties, both which replied. The Court grants the Motion to Dismiss.

LAW

Article XIII, Section 1(2) of the North Dakota Constitution disavows jurisdiction over all Indian land, subject to certain qualifications. The provisions of 25 U. S. C. §§ 1322 and 1326 gives authority to states to assume jurisdiction *with a consent of the tribe* occupying a particular Indian country. Later such jurisdiction would be "over any or all" civil actions arising within such Indian country. Section 1322 states further that those civil laws of a state assuming jurisdiction that are of "general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within the state". Section 1326 requires a special election as a condition to state jurisdiction. The State of North Dakota in the provisions of Section 27-19-01 has extended jurisdiction "over *all* civil causes of action which arise on Indian reservations." This extension of jurisdiction again is subject to the provisions of a tribunal election. The Plaintiff contends that these provisions relate only to the rights of individuals. He cites certain parts of the federal statute relating to "private persons or private parties". The Court does not agree with that interpretation and finds that the quoted excerpts are only descriptive of a general category of laws such as which would be applicable (i. e., negligence) in this case.

The most recent consideration of this problem by the state Supreme Court has been the case of the *United States ex rel. Hall v. Hanson,* 303 N. W. 2d 349 which held that state jurisdiction over "events" occurring on reservation lands may be obtained only by state and tribal compliance with the afore-cited provisions of federal law. The Court cites its previous case of *Nelson v. Dubois,* 232 N. W. 2d 54 which stated that state jurisdiction over Indian country may be obtained only by state and tribal compliance with Sections 1322 and 1326. In neither case was there a qualification relating to tribal persons vis-a-vis tribal governments. The Plaintiff would vitiate the *Hanson* case by concluding that the decision was proper because the area of trespass on federal trusts land has been preempted by federal law. A close reading of the case does not corroborate the Plaintiff's contentions. Accordingly, I hereby grant the Defendant's Motion to Dismiss this action without prejudice to proceed further upon compliance with the appropriate statutes is effected.

Dated at Minot, North Dakota, this 11th day of January, 1982.

BY THE COURT:
/s/ Wallace D. Berning
District Judge

cc: Ct file
J Holm
H McCutcheon
J Sebby
P Kloster

District Court
Fifth Judicial District

Office - Supreme Court, U.S.
FILED
OCT 28 1982
ALEXANDER L. STEVAS
CLERK

No. 82-629

In the Supreme Court of the United States

October Term, 1982

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., A NORTH DAKOTA PROFESSIONAL CORPORATION,
Respondent,

vs.

SCHMIDT, SMITH & RUSH,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF NORTH DAKOTA

HUGH McCUTCHEON
(Counsel of Record)
P.O. Box 939
Minot, North Dakota 58702
(701) 852-3578
Attorney for Respondent Wold Engineering

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3055

I. QUESTION PRESENTED FOR REVIEW

Whether the North Dakota State District Courts have subject matter jurisdiction to hear a civil action arising within the exterior boundaries of an Indian Reservation, and involving Indian litigants, where the Indian tribe within that reservation has failed to consent to the assumption of civil jurisdiction by the state courts.

II. PARTIES TO THE PROCEEDINGS

The parties to this proceeding are:

Three Affiliated Tribes of the Fort Berthold Reservation, Petitioner;

Wold Engineering, P.C., a North Dakota Professional Corporation, and Schmidt, Smith & Rush, Respondents.

III. TABLE OF CONTENTS AND AUTHORITY

A. Contents.

I. Question Presented for Review 1

II. Parties to the Proceedings 1

III. Table of Contents and Authority II

A. Contents II

B. Authority III

1. Federal Case Law III

2. Federal Statutory Law and Rules IV

3. State Case Law IV

4. Other Statutory Law and Rules..... IV

IV. Opinions and Judgments Delivered in the Courts Below 1

V. Jurisdictional Statement 2

VI. Constitutional Provisions and Statutes 2

A. United States Constitutional Provisions 2

B. Federal Statutes 3

C. State Constitutional Provisions and Statutes 4

VII. Statement of the Case 4

VIII. Summary of the Argument 5

IX. Argument 6

A. Grounds for Granting Certiorari 6

B. There Was No Discriminatory Application of a Valid Statute in the North Dakota Court 7

C. There Was No Erroneous Exercise of Authority Under a Valid Statute by the North Dakota Court 12

1. Consistency of State Court decisions is not an important consideration in Indian cases 12

2. The decision of the North Dakota Supreme Court is consistent with this Court's decisions 15

X. Conclusion 18

Appendix 1 19

B. Authority.

Federal Case Law:

Charleston Federal Savings and Loan Ass'n v. Alderson, 324 U.S. 182 (1945) 7

Felix v. Patrick, 145 U.S. 317 (1892) 15, 16

Hanson v. Denckla, 357 U.S. 235 (1958) 7

Kennerly v. District Court of Montana, 400 U.S. 423 (1971) 9, 11, 14, 17

Lonewolf v. Hitchcock, 187 U.S. 553 (1903) 7, 13

McClanahan v. Arizona Tax Comm., 411 U.S. 164 (1973) 8, 9, 11

Morton v. Mancari, 417 U.S. 535 (1974) 10

United States v. Candelaria, 271 U.S. 432 (1926) 15, 16

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 10, 14

Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832) 8

Federal Statutory Law and Rules:

25 U.S.C. Section 1301 et seq. 10, 11, 14, 16
25 U.S.C. Section 1322(a) 2, 3, 7, 8, 9, 10, 14, 16, 17
25 U.S.C. Section 1326 .....3, 7, 8, 9, 10, 14, 16, 17
28 U.S.C. Section 1257(3) 2, 7
28 U.S.C. Section 2101(c) 2
Enabling Act of February 22, 1889, Chapter 180, 25 Statutes at Large 676, Section 4, Clause 2 13
Public Law 280, Chapter 505 U.S. Statutes at Large 67 .....13, 14
Rule 17.1 Rules of the Supreme Court of the United States 12

State Case Law:

Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973) 9
Nelson v. Dubois, 232 N.W.2d 54 (N.D. 1975) 9
United States ex rel. Hall v. Hansen, 303 N.W.2d 349 (N.D. 1981) 9
In re Whiteshield, 124 N.W.2d 694 (N.D. 1963) 8, 14

Other Statutory Law and Rules:

Chapter 27-19, NDCC 2, 4, 7, 8, 10
Section 27-19-02, NDCC 8
Article 16, Section 203, North Dakota Constitution (Constitution of 1889) 13

No. 82-629

In the Supreme Court of the United States

October Term, 1982

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., A NORTH DAKOTA
PROFESSIONAL CORPORATION,
Respondent,

vs.

SCHMIDT, SMITH & RUSH,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI FROM THE SUPREME COURT OF NORTH DAKOTA

IV. OPINIONS AND JUDGMENTS DELIVERED IN THE COURTS BELOW

The Opinion and Judgment of Dismissal from the North Dakota District Court, Northwest Judicial District, in Ward County, Civil No. 46392, is an unreported decision.

Judgment of the North Dakota Supreme Court affirming the decision of the North Dakota District Court is reported at: *Three Affiliated Tribes v. Wold Engineering, et al.*, 321 N.W.2d 510 (N.D. 1982).

V. JURISDICTIONAL STATEMENT

Petitioner asserts that jurisdiction of this Court to review this case by Writ of Certiorari is conferred by 28 U.S.C. Section 1257(3). Petitioner asserts that the final judgment of the North Dakota Supreme Court draws into question the validity of 25 U.S.C. Section 1322(a). It further asserts that the validity of Chapter 27-19, NDCC, Indian Civil Jurisdiction, is called into question as being repugnant to the United States Constitution, treaties or laws.

A Writ of Certiorari is timely if filed within 90 days after the issuance of the decision being appealed. 28 U.S.C. Section 2101(c). The decision of the North Dakota Court was issued on July 1, 1982, and became final on July 23, 1982. Petitioner's Petition for Writ of Certiorari was docketed in the United States Supreme Court on September 28, 1982.

VI. CONSTITUTIONAL PROVISIONS AND STATUTES

A. United States Constitutional Provisions:

Article 1, Section 8, Clause 3.

"The Congress shall have power: . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Amendment 14, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the

United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

B. Federal Statutes:

25 U.S.C. Section 1322(a).

"(a) Consent of United States—Force and effect of civil laws. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

25 U.S.C. Section 1326.

"State jurisdiction acquired pursuant to this title [25 USCS §§1321-1326] with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call

such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults."

C. State Constitutional Provisions and Statutes:

Chapter 27-19, NDCC, Indian Civil Jurisdiction. (Set forth in Appendix 1.)

VII. STATEMENT OF THE CASE

Petitioner, an Indian tribe, and hereafter referred to as Three Tribes, contracted with Respondents, hereafter referred to as Wold Engineering, for the purposes of designing a water system for the Four Bears Village. Four Bears Village is located entirely within the exterior boundaries of the Fort Berthold Indian Reservation. The enrolled members of Three Tribes have not voted to consent to the assumption of civil jurisdiction by the State Courts of North Dakota.

After the water system was completed, Three Tribes initiated a lawsuit against Wold Engineering alleging the system was negligently designed. Suit was commenced in North Dakota District Court.

After submitting its Answer and asserting a counterclaim against Three Tribes, Wold Engineering moved to dismiss the case for lack of subject matter jurisdiction. The Honorable Wallace D. Berning, District Judge, accepted briefs from all parties, and after due consideration dismissed the case for lack of subject matter jurisdiction.

Three Tribes appealed this decision to the North Dakota Supreme Court which affirmed Judge Berning's ruling. Three Tribes makes this petition for Writ of Certiorari to seek review of the North Dakota Supreme Court Decision.

VIII. SUMMARY OF THE ARGUMENT

A petition for certiorari may be allowed when there is drawn into question the validity of a United States statute, or when there is drawn into question the validity of a state statute which may be repugnant to the Constitution, or to a United States statute. Certiorari is granted as a matter of discretion. Factors which this Court may consider when deciding to grant certiorari are that a state court decision is not consistent with decisions in other states, or that the state court decision is not consistent with the decisions of the United States Supreme Court. These factors are neither controlling nor complete.

Congress has plenary power over Indian tribes. When Congress directs a statute to that subject, the Indian tribes, the states, and the courts are absolutely bound thereby. A state response to a federal Indian statute which is consistent with the plain meaning and tenor of that statute is not violative of due process and equal protection.

The response of the United States to particular problems presented by Indian tribes to the Federal Government, and to the states in which they reside, has swung the pendulum from assimilation to self-determination and isolation. Depending upon the various attitudes taken by the states at different points of time along the swing of this pendulum, the response of the many individual states to the Indian tribes residing therein will be substantially different. Having an ever changing federal policy, and no uniform state response to that policy, has created a patchwork quilt of jurisdictional problems and judicial responses. The fact then that different states may assert varying claims to jurisdiction over the Indian tribes within those states is not significant. This variance was created by Congress, and should not give rise to Supreme Court

review of a state decision which differs from the decisions reached in other states.

The swing of the pendulum has been reflected in this Court's Indian decisions as well. While the Supreme Court has stated that state courts are generally open to Indians, those statements were made in relation to the then current Congressional response to Indian problems. When Congress, in the exercise of its plenary authority, changed its position to Indian matters this Court's response to that change in position was also reflected. This Court has held that unless the Indian tribes comply completely with the requirements set forth by Congress in regards to state civil jurisdiction over Indian matters on the reservation, the states can exercise no such jurisdiction, and the tribes cannot confer such jurisdiction. This Court's decision reflects the current federal response to state assumption of jurisdiction over Indians and Indian territory. Thus, a decision by a state court which is contrary to earlier cases, but which fully comports with the current federal position on Indian tribes is not inconsistent with this Court's decisions and will not give rise to Supreme Court review of that decision.

The Indian tribes in North Dakota have the keys to the State Courthouses in their hands. When the Indians elect to use these keys to unlock those doors, they may make use of the State's judicial system.

IX. ARGUMENT

A. Grounds for Granting Certiorari.

Final judgment from the highest court of a state in which a decision may be heard can be reviewed in the Supreme Court either by appeal, or by certiorari. Review by certiorari may be granted where:

". . . the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States." 28 U.S.C. 1257(3).

Three Tribes alleges the decision of the North Dakota Supreme Court is subject to review by certiorari. It states that the North Dakota Court's strict application of the requirements of 25 U.S.C. Section 1322(a), 25 U.S.C. Section 1326, and Chapter 27-19, NDCC, denying Indians living on an Indian reservation a civil cause of action in state courts has denied those Indians equal protection of the law. Three Tribe's argument would require this Court to find a valid statute was given a discriminatory application, or that there was an erroneous exercise of authority under a valid statute. In either instance, the decision might be subject to review by this Court under a Writ of Certiorari. *Charleston Federal Savings and Loan Ass'n v. Alderson*, 324 U.S. 182 (1945); *Hanson v. Denckla*, 357 U.S. 235 (1958).

B. There Was No Discriminatory Application of a Valid Statute in the North Dakota Court.

Three Tribes argues that the North Dakota Supreme Court's ruling requiring Indian tribes to strictly adhere to the requirements set forth in 25 U.S.C. Section 1322(a) and 25 U.S.C. Section 1326, and also to State requirements in Chapter 27-19, NDCC, Indian Civil Jurisdiction, will unfairly deny Indians access to the State's judicial system, and to the equal protection of the law.

The United States Congress has plenary power over Indian tribes. *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903).

A state law is generally of no effect in Indian country located within its boundaries. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832). In discussing briefly the history and relationship of the states to Indian tribes and Indian country, this Court has stated:

> "State laws generally are not applicable to tribal Indians on an Indian reservation except where Congress has expressly provided that state law shall apply. U.S. Department of Interior, Federal Indian Law 845 (1958)." *McClanahan v. Arizona Tax Comm.*, 411 U.S. 164, at 170 and 171 (1973).

Insofar as state civil jurisdiction in North Dakota over Indian lands within this State is concerned, Congress has expressly provided when state laws apply to Indians and Indian country. It has also provided a means by which state laws will be made applicable to Indians and Indian country. Those provisions, 25 U.S.C. Section 1322(a) and 25 U.S.C. Section 1326 require state and tribal bilateral action in accordance with the conditions and procedures laid out in those sections. Although the State of North Dakota has followed these requirements and has provided a mechanism by which Indian tribes may consent to state court assumption of civil jurisdiction, Section 27-19-02, NDCC, Three Tribes has failed to follow the guidelines laid out by Congress and also by the North Dakota legislature.

The North Dakota Supreme Court has ruled that Indian tribes must follow the requirements of Chapter 27-19, NDCC, absolutely before the state may take any jurisdiction in Indian country, and that Chapter 27-19, NDCC, is a complete disclaimer of all State jurisdiction in Indian country. *In re Whiteshield*, 124 N.W.2d 694 (N.D. 1963). The North Dakota Court also held the requirements of 25 U.S.C. Section 1322(a) and 25 U.S.C. Section 1326 must

be followed absolutely before the state courts may assume any civil jurisdiction in Indian country. *Gourneau v. Smith*, 207 N.W.2d 256 (N.D. 1973); *Nelson v. Dubois*, 232 N.W.2d 54 (N.D. 1975); and *United States ex rel. Hall v. Hansen*, 303 N.W.2d 349 (N.D. 1981). These cases, which were the precedents relied upon by the North Dakota Court in its decision in this case, are consistent with this Court's decisions in *McClanahan v. Arizona Tax Comm.*, 411 U.S. 164 (1973); and *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971). Those two cases affirm this Court's consistent position that when Congress exercises its authority and controls an Indian question, neither the states nor the Indian tribes are free to disregard that directive. Therefore, when Congress directs the states and tribes to take affirmative legislative action before a state may assume jurisdiction, that direction is not simply an idle choice of words. *Kennerly*, 400 U.S. at 427. Action by a tribe which does not explicitly comport with the exact requirements of a governing Act of Congress will not be sufficient to confer jurisdiction. *Kennerly*, 400 U.S. at 429.

In this case, Three Tribes has chosen to not follow the explicit course required by Congress. From this choice has followed, as a direct result, the State Court's refusal to allow Indians access to the state court system for acts occurring in Indian country. This consequence is entirely consistent with the plain meaning and obvious intention of 25 U.S.C. Section 1322(a), and 25 U.S.C. Section 1326. 25 U.S.C. Section 1322(a) is directed to all cases between Indians, or to which Indians are parties. The decisions of this Court which address this issue support the State Court's ruling.

It is from this consequence that Three Tribes objects, stating that such a consequence singles them out, and denies to them a forum which is available to all others within

the State of North Dakota. This, it declares, is a denial of equal protection.

This Court has held, however, that every piece of legislation pertaining to Indians of necessity singles those people out. This legislation creates special preferences or disabilities, but in no event is this special treatment a form of discrimination. These legislative preferences are political, and stem from the unique relationship which the Indians enjoy with the United States. *Morton v. Mancari*, 417 U.S. 535 (1974). The fact then that 25 U.S.C. Section 1322(a) singles Indians out for special treatment is not a novel problem, nor is it one which will give rise to a complaint.

Three Tribes declares however, that by singling the Indians out in this instance, Indians are denied access to state courts, and that this is a denial of equal protection. The State Court's reading of the requirements of Chapter 27-19, NDCC, and of 25 U.S.C. Section 1322(a) and 25 U.S.C. Section 1326 is consistent with the plain meaning and intention expressed in those statutes. This reading is fairly calculated to further the state's interest in providing in a uniform and orderly fashion civil jurisdiction in Indian country while at the same time allowing for tribal self government and justice in Indian country. Such state court considerations of Indian policies and federal laws are not denials of equal protection. *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). Following these policies and laws may cause hardship for an Indian or an Indian tribe in a particular case, but such hardship is not a denial of equal protection.

Three Tribes further argues the intent of 25 U.S.C. Section 1301 et seq. was to protect individual Indians from the involuntary foisting of state court jurisdiction upon

them. From this, Three Tribes argues it is clear that the tribe itself is free to make use of the State's courts, and that it was wrong to deny it access, and this thereby denies the tribe, as an entity, equal protection.

This argument is wrong. This chapter of Title 25 U.S.C. was designed to prevent the states from unilaterally asserting their control over Indians and Indian tribes, and thereby destroying a tribe's power to make its own rules and be governed by them. *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971). If 25 U.S.C. Section 1301 et seq. is to apply only to individual Indians, a state would then be free to approach Indian questions arising within the state by dealing with them on a tribal level: for example, while individual Indians would remain free from state taxation (*McClanahan v. Arizona Tax Comm.*, 411 U.S. 164 (1973).) a strictly tribal enterprise would not be exempt and could be freely taxed, just as any other corporate entity. Quite clearly, such an approach is far more devastating to a tribe's power to regulate its own internal affairs than a similar action taken against the individual. Such an approach is not what was intended when Congress passed this Act.

Further, in its argument to the North Dakota Court Three Tribes asserted the tribe itself is not subject to control by the state. Rules of procedure and substantive law could be used by the tribe to compel discovery, subpoena witnesses, and enforce its judgment. On the other hand, it argued that Wold Engineering would not be allowed to do the same on the reservation, nor could Wold Engineering maintain in state court its counterclaim. Hence Three Tribe's position is not consistent, and is patently unfair to non-Indian litigants.

The keys to the state courthouse have been placed in the hands of the Indian tribes in North Dakota by

virtue of the various state and federal laws. Three Tribes has had possession of these keys for nearly 20 years. Its failure to use these keys to unlock the courthouse doors is not an adequate reason to allow it to now enter the North Dakota Courthouse from the rear door while leaving the front door eternally locked.

The North Dakota Supreme Court did not apply a valid statute in a discriminatory fashion.

C. There Was No Erroneous Exercise of Authority Under a Valid Statute by the North Dakota Court.

As stated above, this Court may grant certiorari if there appears to have been an erroneous exercise of authority under a valid statute. When determining whether or not to grant review by certiorari this Court may take into consideration the factors listed in Rule 17.1, Rules of the Supreme Court of the United States. That list, while neither controlling nor conclusive, contains two factors for consideration which Three Tribes asserts will support the grant of a Writ of Certiorari in this case. Three Tribes asserts the decision of the North Dakota Court is not consistent with the decisions of other state supreme courts, and that the decision of the North Dakota Court is not consistent with the rulings of the United States Supreme Court. (See pages 8 and 10 of Petition).

1. Consistency of State Court decisions is not an important consideration in Indian cases.

The problem of having sovereign dependent nations located within the boundaries of this country has been a longstanding and difficult one. From the earliest *Cherokee* cases the policy of the United States has never been en-

tirely clear except in one facet, that is, Indians, while sovereign, are a conquered and dependent people and as such are subject to the plenary authority of Congress. *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903).

Depending upon the attitude of the times, Congressional policy has ranged from either total assimilation of the Indian people into the non-Indian culture, or a total isolation of the Indian people from the non-Indian culture, thereby allowing the Indians to be totally self-governing of their destiny.

This ambivalent course of policy has created its own problem. That is, this ambivalence has swung like a pendulum from one policy directive to another. Depending upon where states have chosen to act along that policy pendulum, the relationship of the Indian tribes to the various states in which they are located will differ from state to state.

At the time North Dakota and many other western states entered the Union the policy of the federal government had swung into the area of isolation. Indians were placed on reservations and these western states, prior to entering the Union, had to constitutionally disclaim forever all jurisdiction to Indian lands. North Dakota was required to make such a disclaimer. Enabling Act of February 22, 1889, Chapter 180, 25 Statutes at Large 676, Section 4, Clause 2, and North Dakota Constitution Article 16, Section 203 (Constitution of 1889).

As time passed, Congressional policy swung and changes were adopted which allowed assimilation of the Indian nations into the non-Indian world. This assimilation policy was most clearly apparent in what is commonly known as Public Law 280, Chapter 505 U.S. Statutes at Large 67. By that law in 1953, Congress granted to some

states total jurisdiction over the Indian tribes within their boundaries. Other states were given the power to amend their constitutions and unilaterally assume some or all jurisdiction over the Indian tribes within their boundaries, regardless of tribal consent to such assumption. *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). Depending upon the various state reactions to Public Law 280, some states assumed jurisdiction while others declined it. North Dakota amended its constitution, but never assumed jurisdiction. *In re Whiteshield*, 124 N.W.2d 694 (N.D. 1963). Hence, the option created by Congress created different results in different states.

As time passed, the pendulum swung back to the notions of self determination. 25 U.S.C. Section 1301 et seq. is the evidence of that decision. That chapter prohibits states which had not assumed jurisdiction under Public Law 280 from unilaterally assuming jurisdiction in Indian country. It is now established that the Indian tribes must comply with the requirements of 25 U.S.C. Section 1322(a) and 25 U.S.C. Section 1326 before any assumption of jurisdiction in Indian country by the states may occur. *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

Hence, depending upon the actions taken by the various states as the pendulum swung, the status of state jurisdiction in Indian country will differ. Three Tribes points to the state court decisions in other states, including North Dakota's neighbor Montana, and makes the point that the decision of the North Dakota Court is inconsistent with the decisions in those cases. Such a point is not significant. These differences exist as a result of the local reaction to the options made available by Congress throughout time. Congress has created a local problem in each state and at each Indian reservation. The response to those local problems will, of necessity, reflect local policy. As these

policies differ, so will the solutions. North Dakota's solution to the Indian jurisdictional problems within this state are not consistent with the solutions of its neighbors, but such an inconsistency is not grounds for review of the decision. The inconsistency simply reflects a fact Congress created. The local decision by the local court is not an erroneous exercise of authority.

2. The decision of the North Dakota Supreme Court is consistent with this Court's decisions.

Three Tribes asserts that the decision of the North Dakota Supreme Court is in conflict with the decisions of this Court as found in *Felix v. Patrick*, 145 U.S. 317 (1892), and *United States v. Candelaria*, 271 U.S. 432 (1926). These decisions cannot be pointed to with any conviction as being the final word from this Court on Indians using state courts. The language which Three Tribes relies upon in *Felix* is simply dictum, to which no great value as precedent can attach. *Candelaria* must likewise be given but slight value as precedent. That decision concerns the effect of a state court judgment on the United States as guardians for an Indian tribe, and does not deal directly with the question presented in this case.

However, it must also be recognized that these cases are now of only historical significance. The cases can not be taken out of their historical context to give meaning to today's decisions.

It must again be stated that it is Congress which has absolute plenary power over the Indian tribes. Any judicial decree or ruling must reflect the current Congressional will. Rulings from this Supreme Court made over 50 years ago must give way to later Acts of Congress which will reflect the prevalent national policy towards

Indians. Hence, the rulings of *Candelaria* and *Felix* must give way to the later expressions of Congress as stated in 25 U.S.C. Section 1301 et seq. Those expressions will require this court to disregard any rulings or dicta of those earlier cases and focus instead upon what Congress has declared to be the current status of the Indian law.

The current status of the law in reference to civil jurisdiction in Indian country is found at 25 U.S.C. Section 1301 et seq. 25 U.S.C. Section 1322(a) states that any state not already having jurisdiction (North Dakota is one such state) may only assume jurisdiction upon tribal consent to such assumption. The procedure for consent by a tribe is set out in 25 U.S.C. Section 1326. That statute requires a special election of the entire tribe to vote on this jurisdiction.

Three Tribes would urge this Court to rely upon *Felix* and *Candelaria* to completely ignore the provisions of this Act. It urges this Court to allow individual Indians, or Indian tribes, to use the state courts for any legal actions in which they are plaintiffs. An Indian tribe would then need to conduct tribal elections and comply with Section 1322(a) and Section 1326 of Title 25, only if they determined that they wished to allow themselves to be brought into state courts as defendants. In other words, the language of Section 1322(a) which refers to "actions between Indians or to which Indians are parties" would be interpreted by Three Tribes to mean "actions in which Indians are defendants." Indians and Indian tribes would be free to use state courts as plaintiffs without following the formalities of a tribal election outlined in 25 U.S.C. Section 1326. This reading is not consistent with the Court's rulings on these statutes, nor is it consistent with the plain meaning of the statute.

In interpreting this Congressional action, this Court has held that the meaning of the provisions of 25 U.S.C. Section 1322(a) and 25 U.S.C. Section 1326 is clear. That is:

> "We think the meaning of these provisions is clear: the tribal consent that is prerequisite to the assumption of state jurisdiction under the provisions of Title IV of the Act must be manifested by majority vote of the enrolled Indians within the affected area of Indian country." *Kennerly v. District Court of Montana*, 400 U.S. 423 at 429 (1971).

This Court in *Kennerly* further held that any action by a tribe which does not comport with the explicit requirements of the Act will not be sufficient to confer jurisdiction on the states.

The meaning of the federal statutes is clear. This Court has held that the obvious meaning of the words in those statutes must be explicitly followed or else an assumption by state courts of Indian civil jurisdiction will be of no avail. Further, the Indians themselves are not free to disregard the clear and explicit requirements of that Act. The North Dakota Supreme Court has followed the federal statutory mandate to the letter, and has ruled consistently with this Court on the meaning of the currently existing federal policy. Three Tribes now asserts that it should be free to ignore the currently stated federal policy, and the clear meaning of that policy. However, since the North Dakota Court has followed all federal mandates, there exists no reason why the decision of the North Dakota Supreme Court should be overruled. There was no erroneous exercise of authority.

X. CONCLUSION

A Writ of Certiorari will only be granted in the sound discretion of this Court. Failure by Three Tribes to reveal a valid reason why a state court decision should be reviewed is sufficient to deny a Writ of Certiorari. Wold Engineering requests therefore that Three Tribe's petition for Writ of Certiorari be denied.

Respectfully submitted this 26th day of October, 1982.

BOSARD, MCCUTCHEON & RAU, LTD.
Attorneys for Respondent
Wold Engineering
200 Heritage Place
P.O. Box 939
Minot, North Dakota 58702
By: Hugh McCutcheon

APPENDIX 1

CHAPTER 27-19

INDIAN CIVIL JURISDICTION

27-19-01. Assumption of jurisdiction.—In accorddance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state shall be to the same extent that the state has jurisdiction over other civil causes of action, and those civil laws of this state that are of general application to private property shall have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state.

27-19-02. Method of acceptance.—Acceptance of jurisdiction may be by either of the following methods:

1. Upon petition of a majority of the enrolled residents of a reservation who are eighteen years of age or older; or
2. The affirmative vote of the majority of the enrolled residents voting who are eighteen years of age or older, at an election called and supervised by the North Dakota Indian affairs commission upon petition of fifteen percent of those eligible to vote at such an election.

27-19-03. Acceptance proclamation.—Upon acceptance of civil jurisdiction by either method provided in section 27-19-02 the executive director of the Indian af-

fairs commission shall certify such acceptance to the governor. Upon such certification the governor shall, within ten days, issue a proclamation proclaiming that thirty days from the date of the issuance of such proclamation the provisions of this chapter shall be in effect.

27-19-04. Effective date.—The provisions of this chapter shall affect only those causes of action which arise after the effective date of state jurisdiction as provided in section 27-19-03.

27-19-05. Individual acceptance.—An individual Indian may accept state jurisdiction as to himself and his property by executing a statement consenting to and declaring himself and his property to be subject to state civil jurisdiction as herein provided. Such jurisdiction shall become effective on the date of execution of such statement. The statement accepting state jurisdiction shall be filed in the office of the county auditor of the county in which the person resides and when so filed shall be conclusive evidence of acceptance of state civil jurisdiction as provided herein. (This section has been held ineffective under the supremacy clause of the United States Constitution and Public Law 90-284, 25 U.S.C. section 1322. *Nelson v. Dubois*, 232 N.W.2d 54 (N.D. 1975).)

27-19-06. Acceptance by guardian.—A guardian appointed by the tribal court or court of Indian offenses may consent to state civil jurisdiction for his ward provided he is authorized to do so by the tribal court or court of Indian offenses. (Public Law 90-284 changed the method by which states could assume civil jurisdiction over actions involving Indians and occurring within Indian country. No action has been taken in North Dakota in compliance with Public Law 90-284 and, consequently, North Dakota does not have jurisdiction over Indians residing within the exterior boundaries of an Indian reservation. Some pro-

visions of this chapter such as section 27-19-05 and possibly section 27-19-06 are no longer effective because of Public Law 90-284. *Malaterre v. Malaterre*, 293 N.W.2d 139 (N.D. 1980).)

27-19-07. Contempt powers.—In addition to other authority conferred by this chapter, the courts of this state shall have the power to hold persons in civil or criminal contempt of court in order to maintain the dignity of the courts and enforce their orders.

27-19-08. Limitations upon jurisdiction.—Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property belonging to any Indian or Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any federal treaty, agreement, or statute, or with any regulation made pursuant thereto; or shall confer jurisdiction upon the state to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein. The civil jurisdiction herein accepted and assumed shall include but shall not be limited to the determination of parentage of children, termination of parental rights, commitments by county mental health boards or county judges, guardianship, marriage contracts, and obligations for the support of spouse, children, or other dependents.

27-19-09. Tribal ordinances and customs preserved.—Any tribal ordinance or custom heretofore or hereafter adopted by any Indian tribe, band, or community, in the exercise of any authority which it may possess shall, if not inconsistent with the applicable civil law of this state, be given full force and effect in the

determination of civil causes of action pursuant to this section.

27-19-10. Other benefits not affected.—The provisions of this chapter shall not be construed as requiring the extension of any health, welfare, educational or other governmental service to Indian reservations or Indian country, not otherwise required by the laws or constitution of this state.

27-19-11. Petition for withdrawal.—Civil jurisdiction as herein provided over an Indian reservation may be terminated by petition of three-fourths of the enrolled residents of a reservation who are eighteen years of age or older. Such petition shall be filed with the North Dakota Indian affairs commission.

27-19-12. Withdrawal proclamation.—Upon the filing of a petition for withdrawal from the civil jurisdiction of the state, the executive director of the North Dakota Indian affairs commission after substantiating that the provisions of section 27-19-11 have been complied with shall certify such withdrawal to the governor. Upon such certification the governor shall, within ten days, issue a proclamation proclaiming that thirty days from the date of the issuance of such proclamation the civil jurisdiction of the state shall be terminated except as to those causes of action which arose prior to the effective date of such termination or to those contractual obligations which were incurred prior to the effective date of such termination of state civil jurisdiction.

27-19-13. Individual withdrawal.—An individual who has accepted state civil jurisdiction under the provisions of section 27-19-05 may withdraw upon filing with the county auditor a statement declaring his withdrawal. Such withdrawal shall not affect causes of action which arose prior to such withdrawal or contractual obligations which were incurred prior to such withdrawal.

Office-Supreme Court, U.S.
FILED
APR 4 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-629

In the Supreme Court of the United States

OCTOBER TERM, 1982

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, PETITIONERS

v.

WOLD ENGINEERING, P.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ELLEN DURKEE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether, in the absence of an assumption of jurisdiction by the State under Public Law 280, over matters occurring on an Indian reservation, the Tribe occupying the reservation may bring an action in state court to recover damages from a non-Indian corporation for negligence and breach of contract in connection with the non-Indian corporation's design and construction of a water system on the reservation.

TABLE OF CONTENTS

	Page
Statement	1
Argument	3
Conclusion	20

TABLE OF AUTHORITIES

Cases:

Blue-Jacket v. *Commissioners of Johnson County*, 3 Kan. 299, rev'd on other grounds *sub nom. The Kansas Indians*, 72 U.S. (5 Wall.) 737	4
Bonnet v. *Seekins*, 126 Mont. 24, 243 P.2d 317	6
Brown v. *Anderson*, 61 Okla. 136, 160 P. 724	6
Bryan v. *Itasca County*, 426 U.S. 373	17, 18
California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508	19
Felix v. *Patrick*, 145 U.S. 317	3-4, 5, 17
Fisher v. *District Court*, 424 U.S. 382	6, 7, 8, 9, 10, 12, 17
Gila River Indian Community v. *Henningson*, 626 F.2d 708, cert. denied, 451 U.S. 911	9
Gourneau v. *Smith*, 207 N.W. 2d 256	12
Harrison v. *Laveen*, 67 Ariz. 337, 196 P. 2d 456	5, 6
Johnson v. *Kerr-McGee Oil Industries, Inc.*, 129 Ariz. 393, 631 P. 2d 548, cert. denied, 454 U.S. 1025	6
Jones v. *Meehan*, 175 U.S. 1	9
Kennerly v. *District Court*, 400 U.S. 423	6, 7, 8, 9, 10, 12, 16, 17
McCrea v. *Busch*, 164 Mont. 442, 524 P. 2d 781	6
McClanahan v. *Arizona State Tax Commission*, 411 U.S. 164	5, 6, 16, 17
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130	8
Mescalero Apache Tribe v. *Martinez*, 519 F.2d 479	9
Montana v. *United States*, 450 U.S. 544	8
Morton v. *Mancari*, 417 U.S. 535	19
Nelson v. *Dubois*, 232 N.W. 2d 54	12

Cases—Continued — Page

Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661 9
Paiz v. *Hughes*, 76 N.M. 562, 417 P. 2d 51 ..... 6, 16
Plyler v. *Doe*, No. 80-1538 (June 15, 1982) 19
Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 6
Poitra v. *Demarrias*, 502 F.2d 23, cert. denied, 421 U.S. 934 18
Ramah Navajo School Board, Inc. v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982) 5-6, 7
Red Hawk v. *Joines*, 129 Or. 620, 278 P. 572 6
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 ..... 7-8, 9
Swartzel v. *Rogers*, 3 Kan. 374 4
United States v. *Candelaria*, 271 U.S. 432 ..... 4, 17
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 9
United States v. *Sandoval*, 231 U.S. 28 4
United States v. *Wheeler*, 435 U.S. 313 9
United States ex rel. Hall v. *Hansen*, 303 N.W. 2d 349 12
United States ex rel. Mackey v. *Coxe*, 59 U.S. (18 How.) 100 9
Vermillion v. *Spotted Elk*, 85 N.W. 2d 432 ..... 10, 12
Warren Trading Post v. *Arizona Tax Commission*, 380 U.S. 685 16
Washington v. *Yakima Indian Nation*, 439 U.S. 463 ..... 11, 14, 17, 19, 20
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 7
Whiteshield, In re, 124 N.W. 2d 694 ..... 11, 12
Whiting v. *Hoffine*, 294 N.W. 2d 921 6
Wiley v. *Keokuk*, 6 Kan. 94 4
Williams v. *Lee*, 358 U.S. 217 ..... *passim*
Wilson v. *Omaha Indian Tribe*, 442 U.S. 653 9
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 4
Yoder v. *Assiniboine & Sioux Tribe*, 339 F.2d 360 .. 18

Constitutions, statutes and regulations:

U.S. Const. Amend. XIV (Equal Protection Clause) 19

Constitutions, statutes and regulations—Continued Page

N.D. Const. § 203 ..... 10, 11, 12, 18, 19
Act of Feb. 27, 1851, ch. 14, Section 7, 9 Stat. 587.. 4
Act of June 20, 1910, ch. 310, Section 2, 36 Stat. 558 4
Act of Aug. 15, 1953 (Public Law 280), ch. 505, 67 Stat. 588 ..... *passim*
Section 4, 67 Stat. 589 (28 U.S.C. (& Supp. V) 1360) 13, 14
Section 4(b), 67 Stat. 589 (28 U.S.C. 1360 (b)) 13
Section 6, 67 Stat. 590 ..... 14, 15
Section 7, 67 Stat. 590 15
Civil Rights Act of 1968, Title IV, Pub. L. No. 90-284, 82 Stat. 78, 25 U.S.C. 1321 *et seq.*:
Section 402(a), 82 Stat. 79, 25 U.S.C. 1322 (a) 15
Section 402(c), 82 Stat. 79, 25 U.S.C. 1322 (c) 9
Section 403(b), 82 Stat. 79, 25 U.S.C. 1323 (b) 15
Enabling Act of Feb. 22, 1889, ch. 180, Section 4, 25 Stat. 676 11
Indian Reorganization Act, Section 16, 25 U.S.C. 476 1
Public Works and Economic Development Act of 1965, Title I, 42 U.S.C. 3131 2
Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729 *et seq.*:
Section 12, 4 Stat. 730 4
Sections 17 and 18, 4 Stat. 731 and 732 (now codified at 25 U.S.C. 229 and 230) 2, 7
Rev. Stat. 2116 (1878 ed.) 4
28 U.S.C. (Supp. V) 1331 9
28 U.S.C. 1362 17
N.D. Cent. Code Ann. (Repl. 1978):
ch. 27-19 (Civil Procedure) 11
§ 27-19-01 ..... 11, 18

Constitutions, statutes and regulations—Continued	Page
25 C.F.R. Part 161 (1949)	2
25 C.F.R.:	
Section 11.1(a)	2
Section 11.1(d)	2
Section 11.22	2, 7
Section 11.23(a)	2, 9
Section 11.23(c)	2, 9
Section 11.26	2
Miscellaneous:	
F. Cohen, *Handbook of Federal Indian Law* (1982)	6
112 Cong. Rec. 20769 (1966)	17
114 Cong. Rec. (1968):	
p. 5520	16
p. 9560	16
p. 9596	16
p. 9615	16
22 Fed. Reg. (1957):	
p. 10515	2
pp. 10518-10519	2
Hearing on H.R. 1063 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 83d Cong., 1st Sess. (1953)	16
H.R. Rep. No. 848, 83d Cong., 1st Sess. (1953)	16
H.R. Rep. No. 2040, 89th Cong., 2d Sess. (1966)	17
Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968)	16
S. Rep. No. 90-721, 90th Cong., 1st Sess. (1968)	16
S. Rep. No. 699, 83d Cong., 1st Sess. (1953)	16
S. Rep. No. 1507, 89th Cong., 2d Sess. (1966)	17

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-629

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, PETITIONERS

v.

WOLD ENGINEERING, P.C., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

Petitioners, the Three Affiliated Tribes of the Fort Berthold Reservation, are organized under a tribal constitution approved by the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. 476. The Tribal Code establishes a Fort Berthold Indian Court, which, at the time this suit arose, had the following jurisdiction over civil matters (ch. II, § 1(a); Pet. 13):[1]

[1] We have been informed by the Department of the Interior that on October 22, 1982, after the decision of the Supreme Court of North Dakota in this case, the Tribal Council amended the Tribal Code to give the Tribal Court jurisdiction over suits against non-Indians. We have been further informed that this amendment was approved by the Secretary of the Interior, as required by the Tribal Constitution.

Jurisdiction. The Fort Berthold Indian Court shall have jurisdiction of all suits wherein the defendant is a member of the Three Affiliated Tribes or an Indian over whom the Court has jurisdiction, and of all other suits between members and non-members brought before the Court by stipulation of the parties.[2]

Petitioners entered into a contract with respondent Wold Engineering for the design and construction of a water system for the Four Bears Village, located within the exterior boundaries of the Reservation. Wold is a professional corporation organized under the laws of North Dakota with offices located off the Reservation (Pet. 6-7). We have been informed by the Economic Development Administration of the United States Department of Commerce that the project was funded in substantial part by a public works project grant from EDA under Title I of the Public Works and Economic Development Act of 1965, 42 U.S.C. 3131.

After construction of the water system was completed, petitioners brought this action in the District

---

[2] This jurisdictional provision is essentially identical to that contained in Interior Department regulations, first promulgated in 1935 (see 25 C.F.R. Part 161 (1949)) and modified in 1957 (22 Fed. Reg. 10515, 10518-10519), conferring civil jurisdiction on the Courts of Indian Offenses established by the regulations for a number of reservations. 25 C.F.R. 11.1(a) and 11.22. See *Williams* v. *Lee*, 358 U.S. 217, 222 (1959); cf. 25 U.S.C. 229 and 230. These regulations contain a section governing choice of law in such suits, requiring the application of any laws or regulations of the United States that govern the cause and any ordinances or customs of the tribe not inconsistent with federal law. 25 C.F.R. 11.23(a). Where federal or tribal law does not cover the particular matter, the Courts of Indian Offenses are to apply the law of the State in which the matter in dispute lies. 25 C.F.R. 11.23(c). The regulations also provide for the payment of the judgment out of the Indian defendant's individual funds held by the Secretary if the defendant himself does not satisfy the judgment. 25 C.F.R. 11.26. These regulations continue to apply to any tribe organized under the Indian Reorganization Act until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective. 25 C.F.R. 11.1(d).

Court for Ward County, North Dakota, claiming that respondent negligently designed the system (Pet. App. 4a-5a). The district court dismissed the complaint for lack of jurisdiction (Pet. App. 1a), and the Supreme Court of North Dakota affirmed (*id.* at 3a-10a).

ARGUMENT

The Supreme Court of North Dakota has closed the courts of that State to suits by Indians against non-Indians concerning matters arising on Indian reservations, even though such suits are not barred by any federal statute and do not impermissibly infringe upon the federally protected sovereignty of the tribes. This decision is at odds with the consistent view of this Court, both before and after the enactment of Public Law 280,[2] that Indians may sue non-Indians in state court. The decision also seriously misapprehends the purpose of Public Law 280, which was to facilitate the assumption by the States of new jurisdiction over matters arising on Indian reservations, not to impose obstacles to the exercise by the States of jurisdiction that already was permissible under federal law, such as the adjudication of suits brought by Indians against non-Indians. The Court accordingly should grant the petition for a writ of certiorari and reverse the judgment of the Supreme Court of North Dakota.

1.a. This Court repeatedly has made clear that Indians may sue non-Indians in state courts and that such suits are fully consistent with accepted principles governing the exercise by the States of jurisdiction over matters arising on Indian Reservations. In *Felix* v. *Patrick*, 145 U.S. 317 (1892), the Court observed with respect to the Indian plaintiffs: "It is scarcely necessary to say in this connection that, while until [they accepted allotments under the applicable treaty] they were not citizens of the United States, capable of suing as such in the Federal courts, the courts of Nebraska were open to them as they are to all persons irrespective of race or color." 145

[2] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588.

U.S. at 332.[4] Three decades later, in *United States* v. *Candelaria*, 271 U.S. 432, 444 (1926), the Court held that a New Mexico state court had jurisdiction to entertain a suit brought by the Indian Pueblo of Laguna against non-Indians to quiet title in the Pueblo to land that was subject to restrictions on alienation under the Trade and Intercourse Act.[5] This despite the fact, not adverted to by the Court, that the Enabling Act for the admission of New Mexico to the Union required the state constitution to provide that absolute jurisdiction and control of Indian lands, including that of the Pueblo Indians, was to be in the Congress of the United States. Act of June 20, 1910, ch. 310, Section 2, 36 Stat. 558. See *United States* v. *Sandoval*, 231 U.S. 28, 36-38 (1913).

The Court reiterated this rule in *Williams* v. *Lee*, 358 U.S. 217 (1959). There the Court held that state courts did not have jurisdiction over a suit by a non-Indian owner of a store on the Navajo Indian Reservation in Arizona against two Navajo Indians to collect for goods sold to them on credit; the suit instead had to be brought in the tribal court, which had been granted jurisdiction over suits by outsiders against Indian defendants. 358 U.S. at 222. Yet even while so ruling, the Court reaffirmed the principle that Indians may sue outsiders in state court (*id.* at 219-220, citing *Felix* v. *Patrick* and *United States* v. *Candelaria*), and it did so while acknowledging that the State of Arizona, where the case arose, is subject to an express disclaimer of jurisdiction over Indian lands in its Enabling Act and state constitution (358 U.S. at 223 n.10).

The Court observed in *Williams* v. *Lee* that the "broad principles" of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515

---

[4] Citing *Blue-Jacket* v. *Commissioners of Johnson County*, 3 Kan. 299 (1865), rev'd on other grounds *sub nom. The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *Swartzel* v. *Rogers*, 3 Kan. 374 (1865); *Wiley* v. *Keokuk*, 6 Kan. 94 (1870).

[5] Rev. Stat. 2116 (1878 ed.), Trade and Intercourse Act of 1834, ch. 161, Section 12, 4 Stat. 730, as extended to New Mexico by the Act of Feb. 27, 1851, ch. 14, Section 7, 9 Stat. 587.

(1832)—which the Court characterized as an instance in which the State of Georgia "sought to impose [its] laws and courts on the Indians" (358 U.S. at 218)—have come to be accepted as law (*id.* at 219). But the Court explained that within these broad principles, state jurisdiction has been recognized "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized"; "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (*id.* at 219, 220). Suits by Indians against non-Indians in state courts were cited as an example of the exercise of state jurisdiction that did not infringe on that right. *Id.* at 219. Moreover, by citing for this proposition not only *Felix* v. *Patrick*, but also *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948)—which held that Indians have a right to vote in Arizona—the Court in *Williams* v. *Lee* again viewed the right of access to state courts as a basic right that Indians share in common with all other persons in the State.

The Court reaffirmed these principles once again in *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973). The Court there held that the State of Arizona could not tax the reservation income of an Indian residing on the Navajo Reservation. But the Court nevertheless twice reiterated that suits by Indians against outsiders in state court are consistent with the principles announced in *Williams* v. *Lee* governing the accommodation of federal, state, and tribal jurisdiction on an Indian reservation (411 U.S. at 171, 173), even while acknowledging the disclaimer of jurisdiction over Indian lands contained in the Enabling Act for Arizona and other States (*id.* at 175-176 & n.14). Indeed, *McClanahan* itself was a suit filed by an Indian in state court in a disclaimer State concerning matters arising on the Reservation, and the propriety of the exercise of jurisdiction by the state courts was never questioned, even though the tax at issue was struck down. See also *Ramah Navajo*

School Board, Inc. v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982).

Moreover, the Court in *McClanahan* once again viewed the right of access to state courts as a right that Indians share along with other citizens of the State, just like the right of Indians to vote[6] and to receive some state services. 411 U.S. at 172-173. See also *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 370-371 (1968), quoting *Brown* v. *Anderson*, 61 Okla. 136, 138-139, 160 P. 724, 726 (1916); *Bonnet* v. *Seekins*, 126 Mont. 24, 243 P.2d 317 (1952). The supreme courts of other States likewise have recognized the right of Indians, like other citizens, to have access to state courts to bring suits against non-Indians concerning matters arising on the reservation. *Whiting* v. *Hoffine*, 294 N.W.2d 921, 923-924 (S.D. 1980); *McCrea* v. *Busch*, 164 Mont. 442, 524 P.2d 781 (1974); *Paiz* v. *Hughes*, 76 N.M. 562, 417 P.2d 51 (1966); *Red Hawk* v. *Joines*, 129 Or. 620, 278 P. 572 (1929). See also *Johnson* v. *Kerr-McGee Oil Industries, Inc.*, 129 Ariz. 393, 395, 631 P.2d 548, 550 (Ct. App.), cert. denied, 454 U.S. 1025 (1981); F. Cohen, *Handbook of Federal Indian Law* 351, 355 (1982).[7]

b. This Court's cases therefore establish that, absent an Act of Congress so providing, reservation Indians may not be sued in state court for matters arising on the reservation, because to do so would interfere with the right of tribal self-government[8]—especially where, as in *Wil-*

---

[6] Once again citing *Harrison* v. *Laveen*, *supra*. See 411 U.S. at 173 & n.10.

[7] The legal principles announced in *Williams* v. *Lee* regarding jurisdiction over suits between Indians and non-Indians also were reiterated in *Fisher* v. *District Court*, 424 U.S. 382, 386 (1976), and *Kennerly* v. *District Court*, 400 U.S. 423, 426-427 (1971).

[8] The test under *Williams* v. *Lee* and related cases for determining whether the exercise of jurisdiction by state courts over causes of action arising on an Indian reservation is lawful—*i.e.*, whether there is governing federal legislation and, if not, whether the state action would infringe on the right of reservation Indians to make their own laws and to be ruled by them—is simply one

liams v. *Lee*, the tribal court has jurisdiction over such disputes. See also *Fisher* v. *District Court*, 424 U.S. 382, 383, 386-389 (1976); *Kennerly* v. *District Court*, 400 U.S. 423, 425 (1971). The state courts may not "impose their * * * courts on the Indians" in this fashion (*Williams* v. *Lee*, *supra*, 358 U.S. at 218), which might "jeopardize[]" the rights of Indians by permitting them to be haled into often hostile state courts (*id.* at 219). This policy of deference to the mechanisms adopted by the tribes—or by the Secretary on their behalf (25 C.F.R. 11.22)—for the redress of grievances against tribal members is of long standing, as reflected in Sections 17 and 18 of the Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 731 and 732, now codified at 25 U.S.C. 229 and 230.

But at the same time, as we have explained, this Court's cases also consistently have recognized the right of an Indian to sue a non-Indian in state court. This implements the principles of *Williams* v. *Lee*. When an Indian voluntarily invokes the jurisdiction of the state court, the State does not "impose" its courts on the Indians. Although it is true that the state court might be as hostile to the Indian's position when he is the plaintiff as when he is the defendant, the Indian plaintiff may be said to have voluntarily accepted that risk by submitting his cause to the state court. And at least where, as in this case when the suit was filed, the tribe has not exercised its inherent sovereign powers by conferring jurisdiction on its tribal courts over suits by Indians against non-Indians with regard to contract disputes or similar reservation matters affecting the tribe or its members (see *Santa Clara Pueblo* v. *Martinez*, 436 U.S.

---

means of describing what this Court has recognized in other cases as two " 'independent but related' barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be preempted by federal law, or it may interfere with the Tribe's ability to exercise its sovereign functions." *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, *supra*, slip op. 4-5, quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980).

49, 65 (1978); *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 139 (1982)), the exercise of jurisdiction by the state courts does not impermissibly interfere with tribal sovereignty or self-government.[9] This is especially so, as in the instant case, when it is the tribe itself that has brought the action in state court. In such a case, the tribe may be held to have determined for itself that submitting the matter to state court is consistent with tribal interests. Moreover, unlike the case of claims *against* Indians, for which an Act of Congress and Interior Department regulations embody a policy of deference to tribal mechanisms for their resolution (see page 7 & note 2, *supra*), there are no federal statutes or regulations that reflect a comparable policy that could be said to preclude suits by Indians against non-Indians in state court.

Finally, where the tribal court does not have jurisdiction of the matter, the effect of a holding that the state courts likewise do not have jurisdiction would be to de-

---

[9] There accordingly is no occasion to consider at this time whether a state court would have jurisdiction over a suit by an Indian against a non-Indian if the tribe had conferred jurisdiction on its tribal court over suits by tribal members against non-Indians concerning matters arising on the reservation. In such a case, in determining whether tribal sovereignty would be impermissibly infringed by the exercise of state jurisdiction, it would be relevant whether the tribal court was vested with exclusive jurisdiction over the subject matter in furtherance of an important tribal interest, or whether the tribe had simply conferred concurrent jurisdiction on the tribal court in the interest of providing an alternative forum for the determination of such disputes. *Cf. Kennerly* v. *District Court*, *supra*, 400 U.S. at 425-426. Compare *Fisher* v. *District Court*, *supra*, 424 U.S. at 384 n.5, 389; see also *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 59-60, 65. In *Kennerly*, the governing statutes regarding the assumption by a State of civil jurisdiction—Public Law 280 and Title IV of the Civil Rights Act of 1968—did not permit the suit against Indians in state court there at issue (400 U.S. at 427-429), irrespective of whether such a suit would impermissibly infringe upon tribal self-government in light of the tribal ordinance recognizing concurrent jurisdiction in the tribal and state courts over suits against Indians (*id.* at 425).

prive the Indian plaintiff of any forum for resolution of the matter, unless the contract or other dispute could be said to arise under federal law for purposes of federal question jurisdiction under 28 U.S.C. (Supp. V) 1331 [10] or unless the requirements of federal diversity jurisdiction were satisfied. By contrast, in *Fisher* v. *District Court*, *Kennerly* v. *District Court*, and *Williams* v. *Lee*, the result of the decision barring state jurisdiction was not to deny a forum for the lawsuit, because the tribal court did have jurisdiction over the case.

2.a. The Supreme Court of North Dakota did not address the decisions of this Court and of other state courts

---

[10] We have been informed that petitioners have adopted a tribal code establishing substantive rules to govern contractual relations on the Reservation. This tribal law might well govern the instant case in state court. A suit brought to enforce rights conferred by tribal law would not appear to be one arising under federal law for purposes of the jurisdiction of federal district courts under 28 U.S.C. (Supp. V) 1331. See *Gila River Indian Community* v. *Henningson*, 626 F.2d 708, 714-715 (9th Cir. 1980), cert. denied, 451 U.S. 911 (1981); see also *Mescalero Apache Tribe* v. *Martinez*, 519 F.2d 479 (10th Cir. 1975). Cf. *United States* v. *Wheeler*, 435 U.S. 313 (1978); but cf. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 682 n.16 (1974). There is, however, no reason why state courts may not apply tribal substantive law in suits within their jurisdiction. See, *e.g.*, *Jones* v. *Meehan*, 175 U.S. 1, 28-32 (1899); *United States ex rel. Mackey* v. *Coxe*, 59 U.S. (18 How.) 100 (1855). Cf. 25 U.S.C. 1322(c); *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 66 n.21, citing *United States ex rel. Mackey* v. *Coxe*, *supra*.

It also is not clear to what extent, if any, the instant suit would be governed by federal law, by virtue of the participation by the Economic Development Administration in the project. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726-727 (1979); cf. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 670-671 (1979). Of course, even if federal law applied because of substantial federal involvement in the Indian transaction at issue, the applicable federal rule of decision might in appropraite circumstances be adopted from tribal or state law. *United States* v. *Kimbell Foods, Inc.*, *supra*, 440 U.S. at 727-740; *Wilson* v. *Omaha Indian Tribe*, *supra*, 442 U.S. at 671-676. Cf. 25 C.F.R. 11.23(a) and (c); note 2, *supra*.

that have recognized that the right to bring suit in state court is one that Indians residing on a reservation in a State share with non-Indian residents of the State and that such suits by Indians do not impermissibly infringe upon tribal sovereignty—at least where the suit is not against another tribal member or where the tribe concerned has not asserted exclusive jurisdiction over the matter. Indeed, the State Supreme Court acknowledged that it previously had held that the courts of North Dakota retained residuary jurisdiction over suits brought by Indians concerning certain matters arising on Indian reservations, notwithstanding the disclaimers in its Enabling Act and its State Constitution adopted in 1889 (Pet. App. 6a, citing *Vermillion* v. *Spotted Elk*, 85 N.W.2d 432 (N.D. 1957)).[11] In *Vermillion*, the court relied on Article I, Section 22 of the North Dakota Constitution, which provides that the courts of the State shall be open to "every man" (85 N.W.2d at 438), and it acknowledged the general rule in other States that Indians, as citizens, have a right to sue in state court (*id.* at 436).

The Supreme Court of North Dakota concluded, however, that a different result was required in the instant case by virtue of Section 203 of the North Dakota Constitution, which was adopted in 1958, after *Vermillion*

---

[11] In *Vermillion*, the Supreme Court of North Dakota held that it had jurisdiction over a suit by one Indian against another for damages arising out of an automobile accident on the Standing Rock Indian Reservation. The particular holding in *Vermillion* could not survive this Court's subsequent decisions in *Williams* v. *Lee*, *Kennerly* v. *District Court*, and *Fisher* v. *District Court*, because the resolution of disputes between tribal members that arise on the reservation is at the core of the right of tribal self-government with which a State may not interfere. However, the rule that suits in state courts between Indians concerning matters arising on the reservation are barred because they infringe upon federally protected tribal sovereignty does not undermine the force of the reasoning in *Vermillion* that state courts must remain open to suits by Indians where the exercise of state jurisdiction would *not* interfere with the overriding federal policy of preserving tribal sovereignty or with a federal statute barring such jurisdiction.

was decided. This constitutional provision was, according to the court, adopted "[u]nder the authority of Public Law 280" (Pet. App. 6a). Section 203 of the North Dakota Constitution reiterates the standard disclaimer, required by Section 4 of the Enabling Act of Feb. 22, 1889 (ch. 180, 25 Stat. 676)[12] and contained in the original North Dakota Constitution, that " 'Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States' " (Pet. App. 6a). Section 203 adds a new provision, however, that permits the state legislature, " 'upon such terms and conditions as it shall adopt, [to] provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress' " (*id.* at 6a-7a). After Section 203 of the State Constitution was adopted, the state legislature then enacted Chapter 27-19 (Civil Procedure) of the North Dakota Century Code Annotated (Repl. 1978) (printed at Br. in Opp. 19-22). Section 27-19-01 of that Code states that "[i]n accordance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter."

The North Dakota Supreme Court concluded in this case that Section 203 of the State Constitution amounts to a "complete disclaimer" of jurisdiction over *all* civil causes of action arising on an Indian reservation, except upon acceptance by the Indians of the reservation in the manner provided by the state statute (Pet. App. 7a, quoting *In re Whiteshield*, 124 N.W. 2d 694 (N.D. 1963)). Accordingly, the court held (Pet. App. 7a) that any ju-

---

[12] The 1889 Enabling Act provided for the admission of the States of North Dakota, South Dakota, Washington, and Montana. See *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 479-481 & n.23 (1979).

risdiction over civil causes of action that previously had existed in the North Dakota courts had been withdrawn.[13]

The court's decision that, under the authority of Public Law 280, the 1958 disclaimer in the State Constitution effects a complete disclaimer of even that jurisdiction over suits concerning matters arising on Indian reservations that state courts could exercise prior to the enactment of Public Law 280 and adoption of the corresponding state constitutional provision is based on a misreading of Public Law 280.[14] There is no indication that in enacting

---

[13] The court explained that following the adoption of Section 203 of the State Constitution, it had overruled *Vermillion* v. *Spotted Elk* in *In re Whiteshield*. The latter case involved an action in state court for the termination of parental rights where all the parties were Indians—a suit, like *Vermillion* itself, over which state court jurisdiction was barred by federal law because such jurisdiction would interfere with tribal sovereignty. Cf. *Fisher* v. *District Court, supra*. Two other of the prior decisions of the North Dakota Supreme Court cited in the decision below as precedent for its holding that state courts did not have jurisdiction here (Pet. App. 7a) involved suits by non-Indians against Indians that likewise would be barred by federal law, under the rationale of *Williams* v. *Lee* and *Kennerly* v. *District Court*. See *Nelson* v. *Dubois*, 232 N.W. 2d 54 (N.D. 1975), and *Gourneau* v. *Smith*, 207 N.W. 2d 256 (N.D. 1973). It apparently was not until 1981 that the North Dakota Supreme Court had occasion to consider whether an Indian could sue a non-Indian in state court with respect to a matter arising on the reservation. See *United States ex rel. Hall* v. *Hansen*, 303 N.W. 2d 349 (N.D. 1981), in which the court held that such a suit could not be brought. Even then, the issue arose in the context of whether the trial court could consider the counterclaim filed by the non-Indian defendant against the Indian plaintiff after the Indian plaintiff withdrew his complaint. *Id.* at 350.

[14] The court's holding also is difficult to reconcile with the text of the state constitutional and statutory provisions involved. Section 203 of the State Constitution speaks of the "acceptance" of jurisdiction that may be "delegated" by Congress. This language suggests an intent to establish a procedure for the receipt of *new* jurisdiction conferred by Congress, not to disclaim preexisting jurisdiction. Similarly, the statute implementing Section 203 provides that, in accordance with Public Law 280, state jurisdiction shall be "extended" to all civil causes of action arising on Indian reservations upon the consent of the Indians; there is no suggestion of a withdrawal of other jurisdiction.

Public Law 280, Congress intended to oust state courts of any jurisdiction—such as that over suits by Indians against non-Indians—which theretofore was not barred by federal law. Nor is there any indication that Congress intended Public Law 280 to be an affirmative authorization for the States, in their discretion, to close their courts to suits by the Indian citizens and tribes of the State where such suits are not independently barred by federal statute, treaty, or regulation or would not impermissibly infringe upon the federally protected sovereignty of the tribe. To the contrary, as we explain below, the entire thrust of Public Law 280 was to facilitate the assumption of *new* jurisdiction by the States.

b. The text of Public Law 280 does not support the decision of the North Dakota Supreme Court. Section 4 of the Act (Act of Aug. 15, 1953, ch. 505, 67 Stat. 589, 28 U.S.C. (& Supp. V) 1360), provides that each of five named States [15] would immediately have civil jurisdiction "over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action * * *." Section 4 was not concerned with the contours of State jurisdiction over civil causes of action involving Indians in the specified areas of Indian country prior to the enactment of Public Law 280, because after its enactment the States were to have jurisdiction over all such suits. Obviously, Section 4 did not oust these five States of any jurisdiction over the specified areas of Indian country or constitute an affirmative authorization to the five States to disclaim jurisdiction over the very areas of Indian country to which Congress had intended them to have complete civil jurisdiction immediately upon enactment of the statute.[16]

---

[15] California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska has since been added to the list.

[16] Subsection (b) of Section 4, 28 U.S.C. 1360(b), contains certain limitations on the exercise of state civil jurisdiction, but those limitations are not at issue here.

North Dakota was not one of the five States for which an immediate vesting of all civil jurisdiction was accomplished by Section 4 of Public Law 280. Instead, because of the disclaimer clause in its Enabling Act and State Constitution, North Dakota was governed by Section 6 of Public Law 280 (67 Stat. 590),[17] which provides:

> Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Nothing in this Section suggests a congressional intent to oust the States of jurisdiction they theretofore had been exercising or to authorize the States to disclaim any such jurisdiction. Section 6 speaks instead of the "assumption" of jurisdiction—which connotes a transfer of *new* jurisdiction from the federal government to the States—and the removal of impediments to that assumption contained in the Enabling Act or state constitution. The purpose of Section 6 was to provide a mechanism whereby States such as North Dakota could place themselves on an equal footing with the five States that acquired jurisdiction automatically under Section 4 of the Act, which, as we have explained, clearly did not permit the affected States to disclaim jurisdiction.

In addition, as we also have explained (see pages 4-5, *supra*), the disclaimer clauses in the Enabling Acts and state constitutions of North Dakota and other states were not impediments to the exercise of jurisdiction by state

---

[17] See *Washington* v. *Yakima Indian Nation*, *supra*, 439 U.S. at 474.

courts over civil suits brought by an Indian against a non-Indian with respect to matters arising on the reservation. The authorization in Section 6 of Public Law 280 for States to remove the disclaimer clause impediments to jurisdiction therefore was not necessary for these States to continue to exercise jurisdiction over such suits. As a result, Section 6 of Public Law 280 has no bearing on the issue in this case. At the very least, that Section cannot be read in the manner adopted by the Supreme Court of North Dakota to authorize the States to adopt *broader* disclaimer provisions than previously were in effect in order to bar jurisdiction over suits by Indians against non-Indians that state courts previously could entertain.

The foregoing interpretation of Section 6 is reinforced by Section 7 of Public Law 280 (67 Stat. 590), which provided that as to the other "option" States, for which there is not a disclaimer in the Enabling Act or state constitution (*ibid.*; emphasis added):

> The consent of the United States is hereby given to any other State *not having jurisdiction* with respect to * * * civil causes of action * * * as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State, shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Once again, this provision addressed only those situations in which the States did not already have jurisdiction. Section 7 of Public Law 280 was repealed by Section 403(b) of the Civil Rights Act of 1968, Title IV, Pub. L. No. 90-284, 82 Stat. 79, 25 U.S.C. 1323(b). However, 25 U.S.C. 1322(a), enacted as Section 402(a) of the Civil Rights Act of 1968 (82 Stat. 79), which governs the assumption of jurisdiction by all States—including North Dakota—that had not acquired jurisdiction over Public Law 280 prior to 1968, is written in similar terms that grant the consent of the United States to any State "not having jurisdiction" over civil causes of action to assume such jurisdiction. There is no expression of an intent to disturb state jurisdiction that already was permissible

under federal law without regard to Public Law 280 or the 1968 amendments to that law.

c. Nor does the legislative history of Public Law 280 support the interpretation given it by the North Dakota Supreme Court. That history repeatedly refers to the Act as providing for an "extension" or "transfer" of civil jurisdiction or to "confer" jurisdiction on the States, thereby confirming the legislative purpose to facilitate an assumption of new jurisdiction by the States. See, *e.g.*, H.R. Rep. No. 848, 83d Cong., 1st Sess. 6, 7 (1953);[18] S Rep. No. 699, 83d Cong., 1st Sess. 5-7 (1953); *Hearing on H.R. 1063 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 13, 17, 18, 22 (June 29, 1953) (unpublished, but lodged with the Clerk of this Court); *id.* at 1, 11 (July 15, 1953).[19] This Court's decisions likewise describe Public Law 280 as designed to accomplish a transfer of jurisdiction to and assumption of jurisdiction by the States. See, *e.g.*, *Williams* v. *Lee*, *supra*, 358 U.S. at 222-223; *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 687 n.3 (1965); *Kennerly* v. *District Court*, *supra*, 400 U.S. at 427, 428, 429;[20] *McClanahan* v. *Ari-*

---

[18] The House Report also refers (*id.* at 5, 7) to civil jurisdiction "over Indians," which suggests in personam jurisdiction over Indians as *defendants*.

[19] This same view is reflected in the legislative history of the 1968 Civil Rights Act that amended Public Law 280. See, *e.g.*, S. Rep. No. 90-721, 90th Cong., 1st Sess. 32 (1968) (additional views of Senator Ervin); *Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 25 (1968) (referring to tribal consent requirement to assumption of jurisdiction to ensure that Indians are not "subjected" to state courts before they are ready); *id.* at 27, 32, 38, 91 (discussing *Paiz* v. *Hughes*, *supra*, in which an Indian sued a non-Indian), 104, 108-109, 115-116, 120-121, 133; 114 Cong. Rec. 9560, 9596, 9615 (1968); *id.* at 5520 (Presidential message).

[20] In *Kennerly*, the Court observed that at the time the case arose, "[w]ith regard to the particular question of the extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country," there was a governing Act of Congress,

zona State Tax Commission, *supra*, 411 U.S. at 177-178; *Fisher* v. *District Court*, *supra*, 424 U.S. at 388, 389; *Bryan* v. *Itasca County*, 426 U.S. 373, 381, 385, 386 (1976); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 475, 483, 484, 485, 486 & n.29, 490, 491, 492 n.36, 493, 495, 497, 499 (1979).

It would be inconsistent with the purpose of Public Law 280 of facilitating the exercise by the States of jurisdiction over all civil causes of action arising on Indian reservations [21] to interpret that law to impose a new federal impediment to the exercise of jurisdiction over suits such as that involved here. Indeed, in *Williams* v. *Lee* and *McClanahan* v. *Arizona State Tax Commission*, in which Public Law 280 was specifically discussed, the Court reiterated the long-established rule, drawn from *Felix* v. *Patrick* and *United States* v. *Candelaria*, that Indians may sue non-Indians in state court, without any suggestion that the enactment of Public Law 280 had withdrawn that jurisdiction from the States or authorized the States to disclaim it.[22]

Public Law 280. 400 U.S. at 427, quoted in *Bryan* v. *Itasca County*, 426 U.S. 373, 386 (1976). *Kennerly*, however, involved a suit against an Indian by a non-Indian. The reference to suits brought *by* Indians therefore was dictum, even assuming that it was made with reference to the type of suit involved here. There was, moreover, no reference in *Kennerly* to the prior cases sustaining state jurisdiction over suits brought by Indians against non-Indians. In addition, it would be inconsistent with the Court's use of the phrase "extension of state jurisdiction" to read the passage in the Court's opinion as a suggestion that Congress at the same time withdrew jurisdiction over certain causes of action until the new procedural requirements of Public Law 280 were satisfied.

[21] See *Washington* v. *Yakima Indian Nation*, *supra*, 439 U.S. at 490-491.

[22] When Congress enacted 28 U.S.C. 1362 in 1966 to give federal courts jurisdiction over suits by recognized tribes arising under federal law without regard to the amount in controversy, the assumption was that such suits otherwise would be brought in state court, if at all. S. Rep. No. 1507, 89th Cong., 2d Sess. 2-3 (1966); H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2-3 (1966); 112 Cong. Rec. 20769 (1966). It is instructive that the suit that was cited in

Finally, even if the civil jurisdiction provisions of Public Law 280 were thought to be ambiguous with regard to their effect on suits by Indians against non-Indians, this Court has made clear that the construction of Public Law 280 is to be "guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n.7 (1976), that 'statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918)." *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 392. Without a clear expression of congressional intent, Public Law 280 cannot, consistent with this principle of statutory construction, be interpreted to abrogate the preexisting and uniformly recognized right, possessed by Indians along with non-Indians, to sue in state court. See *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 382.

3. Although the North Dakota Supreme Court's decision in the instant case purported to be based on the disclaimer clause in Section 203 of the State Constitution and the state statute passed pursuant to Section 203, it is clear that the court's construction of the State Constitution and statute ultimately rested on the court's interpretation of Public Law 280 as either authorizing or requiring the State to disclaim jurisdiction over suits such as that involved here. See also *Poitra* v. *Demarrias*, 502 F.2d 23, 27 (8th Cir. 1974), cert. denied, 421 U.S. 934 (1975). The court observed, for example, that Section 203 of the State Constitution was adopted "[u]nder the authority of Public Law 280" (Pet. App. 6a), and Section 27-19-01 provides for the assumption of jurisdiction "[i]n accordance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution" (Br. in Opp. 19).

---

the legislative history as an example of the type of suit for which the statute was designed, *Yoder* v. *Assiniboine & Sioux Tribe*, 339 F.2d 360 (9th Cir. 1964), arose in Montana, a disclaimer state, after the enactment of Public Law 280.

Moreover, Section 203 itself refers to the acceptance of jurisdiction "as may be delegated to the state by Act of Congress"—a reference to Public Law 280 and like statutes. State jurisdiction over suits by Indians against non-Indians was not "delegated" by Congress in Public Law 280; it was an aspect of state jurisdiction that never was barred or displaced by the disclaimer clauses in the Enabling Acts. Accordingly, it seems likely that the North Dakota Supreme Court would not construe Section 203 of the State Constitution and the state statute implementing that Section to bar jurisdiction in the instant case if this Court were to hold, as we submit, that Public Law 280 is not a bar to such suits.

Indeed, a contrary construction of the State Constitution and statute would raise a substantial question under the Equal Protection Clause of the Fourteenth Amendment to the Constitution. See also 42 U.S.C. 1981 ("All persons within the jurisdiction of the United States shall have the same right in every State and Territory * * * to sue * * * as is enjoyed by white citizens * * *"). The result of such a holding would be that a State may deprive Indians of the fundamental right of access to state courts [23] without any authorization given by the federal government in furtherance of an overriding federal policy regarding Indian affairs that might make an ouster of state jurisdiction appropriate. Compare *Plyler* v. *Doe*, No. 80-1538 (June 15, 1982), slip op. 21-23. In *Washington* v. *Yakima Indian Nation*, *supra*, the Court reaffirmed that the unique legal status of Indian tribes under federal law permits the federal government to enact legislation singling out Indian tribes, even though that legislation might otherwise be constitutionally offensive. 439 U.S. at 500-501, citing *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). The Court stressed, however, that "States do not enjoy this same unique relationship with Indians" (439 U.S. at 501). The Court nevertheless sus-

---

[23] See, *e.g.*, *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972).

tained the state jurisdictional statute there at issue because the Court found that it was enacted in response to Public Law 280 and was within the scope of the authorization granted by that law. 439 U.S. at 501. In this case, by contrast, Public Law 280 did not purport to authorize the State of North Dakota to disclaim any preexisting jurisdiction over suits by Indians against non-Indians.

CONCLUSION

The petition for a writ of certiorari should be granted, the judgment of the Supreme Court of North Dakota should be reversed insofar as it rests on that court's interpretation of Public Law 280 as requiring or authorizing a disclaimer by the State of jurisdiction over this suit, and the case should be remanded for further proceedings regarding the interpretation of the State Constitution and statute, consistent with the views expressed herein.

Respectfully submitted.

REX E. LEE
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ELLEN DURKEE
Attorney

APRIL 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 408148 1319

Office Supreme Court, U.S.
FILED
JUL 28 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-629

In The
Supreme Court of the United States
October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., and SCHMIDT, SMITH & RUSH, P.C.,
Respondents.

On Certiorari to the Supreme Court of North Dakota

PETITIONER'S BRIEF

JOHN O. HOLM,*
17 Second Avenue West
Dickinson, North Dakota 58601
(701) 225-6066

CHRISTOPHER D. QUALE
RAYMOND CROSS
Box 220
New Town, North Dakota 58763
(701) 627-3621

Counsel for Petitioner

July 1983

*Counsel of Record

COCKLE PRINTING CO., 2111 Douglas St., Omaha 68102

QUESTIONS PRESENTED

1. Whether Public Law 280 authorizes a state to enact a statute barring an Indian's claim for damages, due to the negligent design of a water intake system on-reservation, against a non-Indian engineering firm, unless the affected Indians vote to accept state jurisdiction under state law.

2. Whether federal policy embodied in decisional law and in Public Law 280, as amended, providing, among other things, for the orderly transfer of limited federal authority over Indian affairs to the states, should be understood as prohibiting state judicial jurisdiction over suits brought by Indians against non-Indian defendants under state law where no interference with tribal or federal regulatory interests is involved.

3. Whether Chapter 27-19 of the North Dakota judicial code, consistent with the Equal Protection and Due Process clauses of the Fourteenth Amendment, should be regarded as depriving Indian plaintiffs of a forum for enforcement of state-created rights.

PARTIES TO THE ACTION

The parties to this proceeding are the Three Affiliated Tribes of the Fort Berthold Reservation, Petitioner; Wold Engineering, P.C., a North Dakota professional corporation, Respondent; and, Schmidt, Smith & Rush, Respondent.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Action	i
Table of Authorities	iv
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions	2
Statement of the Case	2
Summary of Argument	5
Argument:	
I. North Dakota has no state policy barring Indian suits based on state law against non-Indians in State Court.	9
A. Introduction	9
B. State law authorized Indian suits against non-Indians before the enactment of Chapter 27-19 of the North Dakota Century Code.	10
C. The State Court construed Chapter 27-19 of the State Judicial Code as constituting a federally authorized disclaimer of state jurisdiction over all Indian claims arising on-reservation.	10
II. Federal policy does not require an absolute bar against state judicial jurisdiction over suits by Indians against non-Indian defendants under state law where no interference with federal or tribal interests is involved.	14
A. North Dakota has adopted federal law as the governing limit on its judicial power over Indians.	14

TABLE OF CONTENTS—Continued

Page

B. North Dakota's failure to accept Public Law 280 jurisdiction does not bar the Tribe's negligence action against a non-Indian in state court. 16

C. There is no federal decisional rule barring petitioner's action in state court. 27

III. Congress did not consent to, or authorize, North Dakota's enactment of Chapter 27-19 of its judicial code. 32

A. Congress imposed, through Section 7 of Public Law 280, strict requirements that North Dakota failed to meet. 32

B. Congress by its 1968 amendments to Public Law 280, has rendered moot the state court's assumption that petitioner must consent, as a matter of federal law, under Chapter 27-19 of the state judicial code as a prerequisite to state court's jurisdiction over petitioner's action. 34

IV. Chapter 27-19 of the North Dakota Judicial Code, as construed by the State Supreme Court, violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. 38

A. Introduction 38

B. The State Statute clearly conflicts with the Petitioner's Due Process rights. 40

C. The appropriate standard of judicial review of this state legislation is strict scrutiny. 44

D. The state law in question does not represent the least restrictive solution to any jurisdictional concerns the state may have. 47

Conclusion 48

Appendix A. 1

TABLE OF AUTHORITIES

Pages

UNITED STATES SUPREME COURT CASES:

Arizona v. San Carlos Apache Tribe, 51 U. S. L. W. 5095 (U. S. June 28, 1983) 6, 7, 26, 27

Breisch v. Central R. R., 312 U. S. 484 (1941) 15

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U. S. 673 (1930) 41

Bryan v. Ithasca County, 426 U. S. 373 (1976) 19, 27

The Civil Rights Cases, 109 U. S. 3 (1883) 39

Felix v. Patrick, 145 U. S. 317 (1982) 28

Fisher v. District Court, 424 U. S. 382 (1976) 29

Kennerly v. District Court, 400 U. S. 423 (1971) ..... *passim*

Logan v. Zimmerman Brush Co., 455 U. S. 422 (1982) 43

Loving v. Virginia, 388 U. S. 1 (1967) 44

Lynch v. Household Finance Corporation, 405 U. S. 538 (1971) 42, 43

McClanahan v. Arizona State Tax Commission, 411 U. S. 164 (1973) 26, 28, 29, 31

Mobile & S. Ohio R. R. v. Tennessee, 153 U. S. 486 (1894) 24

Morton v. Mancari, 417 U. S. 535 (1974) 44

Murry's Lessee v. Hoboken Land and Improvement Co., 18 U. S. (How.) 272 (1856) 24

Plyer v. Doe, 457 U. S. 202 (1982) 44, 45, 46

Sniadich v. Family Finance Corp., 395 U. S. 337 (1969) 42, 43

Tipton v. Atchison T. & S. F. Ry., 298 U. S. 141 (1936) 15

TABLE OF AUTHORITIES—Continued

	Pages
United States v. O'Brien, 391 U. S. 367 (1968)	45
United States v. Carolene Products, 304 U. S. 144 (1938)	40, 43
United States v. Chicago R. I. & P. R. Co., 282 U. S. 311 (1931)	32
United States v. Kagama, 118 U. S. 375 (1886)	19, 45
Warren Trading Post v. Arizona State Tax Commission, 380 U. S. 685 (1965)	30, 31
Washington v. Yakima Indian Nation, 439 U. S. 463 (1979)	*passim*
Williams v. Lee, 358 U. S. 217 (1959)	*passim*
Worcester v. Georgia, 31 U. S. (6 Pet.) 515 (1832)	6
OTHER FEDERAL CASES:	
Agua Caliente Band of Mission Indians v. Palm Springs, 347 F. Supp. 42 (C. D. Cal. 1974)	21
Anderson v. Gladden, 293 F. 2d 463 (9th Cir. 1961)	20
Bird v. Terry, 129 F. 472 (C. C. W. D. Wash. 1903)	25
City of New Town v. U. S., 454 F. 2d 121 (8th Cir. 1972)	2
Corfield v. Coryell, Case No. 3230, 4 Wash. at 371 (C. C. E. D. Pa. 1823)	40
Deere v. New York, 22 F. 2d 851 (N. D. N. Y. 1927)	25
Omaha Tribe v. Walthill, 334 F. Supp. 823 (D. Neb. 1971), *affirmed*, 460 F. 2d 1327 (8th Cir. 1972)	27
Poitra v. Demarrias, 502 F. 2d 23 (8th Cir. 1974), *reversing*, 369 F. Supp. 257 (D. N. D. 1973)	13
Quechan Tribe v. Rowe, 531 F. 2d 408 (9th Cir. 1976)	31

TABLE OF AUTHORITIES—Continued

Pages

Robinson v. Wolff, 349 F. Supp. 514 (D. Neb.), *affirmed*, 468 F. 2d 438 (8th Cir. 1972) 21

Schantz v. White Lightning, 502 F. 2d 67 (8th Cir. 1974) 41

STATE CASES:

Gourneau v. Smith, 207 N. W. 2d 256 (N. D. 1973) 12, 13, 30

Lohnes v. Cloud, 254 N. W. 2d 430 (N. D. 1977) 41

Morgan v. Colorado River Indian Tribe, 7 Ariz. App. 92, 436 P. 2d 484, *vacated on other grounds*, 103 Ariz. 425, 443 P. 2d 421 (1968) 34

Nelson v. Dubois, 232 N. W. 2d 64 (N. D. 1975) 37

Robinson v. Sigler, 187 Neb. 144, 187 N. W. 2d 756, *appeal dismissed*, 404 U. S. 987 (1971) 21

Rolette County v. Eltobgi, 221 N. W. 2d 645 (N. D. 1974) 13, 39, 46

Schantz v. White Lightning, 231 N. W. 2d 812 (N. D. 1975) 12

State v. Molash, 86 S. D. 558, 199 N. W. 2d 591 (1972) 34

Three Affiliated Tribes v. Wold Engineering, 321 N. W. 2d 510 (N. D. 1982) 1, 14, 22, 45

Vermillion v. Spotted Elk, 85 N. W. 2d 342 (N. D. 1957) 10, 12

White Eagle v. Dorgan, 209 N. W. 2d 621 (N. D. 1973) 13

In re White Shield, 124 N. W. 2d 694 (N. D. 1963) 12

Whyte v. District Court, 140 Colo. 334, 346 P. 2d 1012 (1959), *cert. denied*, 363 U. S. 829 (1960) 34

TABLE OF AUTHORITIES—Continued

Pages

UNITED STATES CONSTITUTION:

U. S. Const., art. XIV, § 1 ..... *passim*

UNITED STATES STATUTES:

North Dakota's Enabling Act, § 4, 25 Stat. 677 1

8 U. S. C. § 1401 (2) 19

28 U. S. C. § 1257 (3) 1

Public Law 280 of 1953, Ch. 505, Sections 6 and 7, 67 Stat. 589. Section 7 was repealed by Section 403 (b) of P. L. 90-284, 82 Stat. 79. Section 6 was reenacted by Section 404 of that same statute and is now codified at 25 U. S. C. § 1324. Section 402 (a) is codified at 25 U. S. C. § 1322 (a). Section 406 is codified at 25 U. S. C. § 1326 ..... *passim*

NORTH DAKOTA CONSTITUTION:

N. D. Const., art. I, § 22 ..... 2, 24, 39

N. D. Const., art. XVI, § 203, amended and renumbered as art. XIII, § 1 ..... 2, 5, 11

NORTH DAKOTA STATUTES:

N. D. Cent. Code § 27-19-01 ..... *passim*

N. D. Cent. Code § 27-19-02 (1) 37

N. D. Cent. Code § 27-19-02 (2) 2, 35

N. D. Cent. Code § 27-19-05 ..... 2, 37

FEDERAL REPORTS AND HEARINGS:

Background Report on Public Law 280, Committee on Interior and Insular Affairs, U. S. Senate, 94th Cong., 1st Sess. (1975) 20, 21, 34, 35

TABLE OF AUTHORITIES—Continued

Pages

Hearings on H. R. 1519, Before the House Subcommittee on Indian Affairs, 90th Cong., 2d Sess. (March 29, 1968) ——— 35

H. Rep. No. 848, 83rd Cong., 1st Sess. (1953) ——— 17, 19

S. Rep. No. 699, 83rd Cong., 1st Sess. (1953) ——— 17, 18, 19

S. Rep. No. 841, 90th Cong., 1st Sess. (1967) ——— 35

Hearings on H. R. 1063, Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. (June 29, 1953), Transcript I ——— 17, 18

Hearings on H. R. 1063, Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83rd Cong., 1st Sess. (July 15, 1953), Transcript II ——— 17, 23

SECONDARY SOURCES:

Burnette, *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 Harv. J. on Legis. 557 (1972) ——— 35, 36

Cohen, *Handbook of Federal Indian Law* (University of New Mexico Press, 1971 Reprint) ——— 28

Deaby, *The Growth of American State Constitutions*, (DeCapo Press, 1972) ——— 39

Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U. C. L. A. L. Rev. 535 (1975) ——— 18, 36

Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Col. L. Rev. 321 (1935) ——— 37

Kutner, *Can Federal Courts Remain Open when State Courts are Closed? Erie Tompkins on the Indian Reservation*, 52 N. D. L. Rev. 647 (1975) ——— 13

TABLE OF AUTHORITIES—Continued

Pages

Linde, *Due Process of Law Making*, 55 Neb. L. Rev. 197 (1976) 47

Schwartz, *Statutory History of the United States: Civil Rights*, Part 1 40

No. 82-629

In The
Supreme Court of the United States
October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., and SCHMIDT, SMITH & RUSH, P.C.,
Respondents.

On Certiorari to the Supreme Court of North Dakota

PETITIONER'S BRIEF

OPINIONS BELOW

The judgment of dismissal of North Dakota for the Northwest Judicial District in Ward County, Civil No. 46392, is an unreported decision. The judgment of the North Dakota Supreme Court affirming the district court's dismissal of petitioner's action is reported at 321 N. W. 2d 510 (1982).

JURISDICTION

The decision and judgment of the Supreme Court of North Dakota was entered on July 1, 1982. This Court has jurisdiction over this case under 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The text of the following constitutional provisions and statutes relevant to the determination of the present case are set forth in the Appendices:

Federal: U.S. Const. art. XIV, § 1; Section 4 of North Dakota's Enabling Act, 25 Stat. 677; Sections 6 and 7 of Public Law 280, 67 Stat. 589; Sections 402(a), 403(b), 404, and 406 of Public Law 90-284, 82 Stat. 79. Section 403(b) repealed Section 7 of Public Law 280. Section 404 re-enacted Section 6 of that same statute and is now codified at 25 U. S. C. § 1324 (1983). Section 402(a) is codified at 25 U. S. C. § 1322(a) (1983). Section 406 is codified at 25 U. S. C. § 1326 (1983).

State: North Dakota Const. art. XVI, § 203, amended and renumbered as art. XIII, § 1; art. I, § 22; N. D. Cent. Code §§ 27-19-01, 27-19-02(2), and 27-19-05.

STATEMENT OF THE CASE

This case concerns an action for damages brought by the Three Affiliated Tribes, a federally-recognized Indian tribe, against a non-Indian engineering firm. This case arose on the Fort Berthold Indian Reservation in North Dakota. That reservation had been set aside for the use and occupancy of the Mandan, Gros Ventre, and Arikara tribes by the Act of March 3, 1891, 26 Stat. 1032. *See City of New Town v. United States,* 454 F. 2d 121 (8th Cir. 1972).

Petitioner, the Three Tribes, contracted in 1974 with respondent, Wold Engineering Company. Wold is a professional corporation organized under the laws of North Dakota and has its principal office off-reservation in Bot-

tineau, North Dakota. Wold was employed by petitioner to design a public works project on the Fort Berthold Indian Reservation. The purpose of this project, known as the Four Bears Water Systems Project, was to provide a continuous, safe, and secure domestic water supply source to serve the needs of a portion of the reservation populace. This was to be accomplished by diverting water from Lake Sakakawea through an intake structure and pump system (J.A. 2).

Respondent undertook the project and had installed a submersible pump, built to its design specifications, on a pier of the Four Bears Bridge that crossed the Lake. That system was completed on July 29, 1977. However, that system was subject to continual failure and despite several attempts at correction by respondent, the system has never delivered a continuous supply of water as was contemplated by the project's purpose (J.A. 2-3).

Despite a meeting between the Tribe and Wold Engineering on March 21, 1979, there was no final resolution of the problems with the water system. Petitioner has spent more than $200,000.00 on this project (J.A. 3).

Petitioner commenced a negligence and breach of contract action against respondent on March 20, 1980 (J.A. 3). The cause of action for damages was based on Wold's negligent design of the project and on its breach of its contract with the Tribe (J.A. 2-3). Wold also sued Schmidt, Smith & Rush, a subcontractor that worked on that project, and brought it into the case as a third-party defendant (J.A. 9). State court jurisdiction over petitioner's negligence action against Wold is premised both on the service of process on respondent within the state in accordance with North Dakota law and the fact that the conduct of re-

spondent that forms the basis of petitioner's action occurred in North Dakota (J.A. 2).

On January 11, 1982, trial on petitioner's complaint was commenced in State District Court for the Northwest Judicial District. Wold moved the court that same day to dismiss the Tribe's action against it (J.A. 18). That motion was based on the ground that because the Tribe's cause of action arose on-reservation the state court, as a matter of federal law, lacked jurisdiction over the case entirely. Respondent's motion was granted by the trial judge on January 11, 1982 (J.A. 20).

Thus, petitioner was never accorded a hearing on the merits of its complaint against respondent. Instead, the trial court dismissed petitioner's action on a preliminary motion solely on the ground that it lacked subject matter jurisdiction over petitioner's cause of action. That dismissal was viewed by the court as required by federal law (J.A. 19-20).

On February 23, 1982, petitioner filed his Notice of Appeal to the Supreme Court of North Dakota (Pet. 2a). The Supreme Court of North Dakota issued its decision on July 1, 1982, affirming the district court's dismissal of petitioner's action (Pet. 3a).

In the course of the supreme court's decision it reviewed the history of state judicial jurisdiction over Indian claims arising on-reservation. The state supreme court, despite the fact that there was no state policy barring Indian suits against non-Indians in state court, concluded that it was compelled to affirm the dismissal of the action because of a federal law that prohibited state judicial authority over this type of action. This law is the Act of August 15, 1953, 67 Stat. 588, popularly known as Public Law 280. More particularly, the state supreme

court construed a state statute, Chapter 27-19 of the state judicial code, to require that state courts close their doors to Indian claims arising on-reservation. This state law was held to be authorized by Public Law 280.

The state had amended its state constitution in 1958 to remove the federally-imposed disclaimer over Indian lands within the state. N. D. Const. Art. XVI, § 203, amended and renumbered as art. XIII, § 1 (A. 3a). The state legislative assembly then enacted, in 1963, Chapter 27-19 of the North Dakota Century Code (A. 4a). It was this state law, as adopted under Public Law 280, that the supreme court deemed closed the state courts to Indians who sued on claims that arose on-reservation. The court construed the state statute, enacted under ostensible federal consent, as prohibiting civil jurisdiction over petitioner's claim until he consented to the exercise of state jurisdiction over the reservation.

The Tribe filed its Petition for Writ of Certiorari on September 28, 1982. This Court granted that Petition on April 25, 1983. 103 S. Ct. 1872 (1983). The Three Affiliated Tribes' Constitution, Chapter II, § 1(a), does not authorize the tribal court to exercise jurisdiction over non-Indians for civil jurisdictional purposes absent the non-Indian's consent to such jurisdiction.

SUMMARY OF ARGUMENT

The fundamental issue is whether the Supreme Court of North Dakota erred in affirming the dismissal by the state district court of the Three Affiliated Tribes' negligence action against a non-Indian engineering firm based on the ground that federal law either authorized or com-

pelled the adoption of a state statutory disclaimer, Chapter 27-19 of the state judicial code, of civil jurisdiction of suits by Indians against non-Indians arising on an Indian reservation.

Congress' authority and jurisdiction over the subject matter of Indian affairs was established early in this country's history. *Worcester v. Georgia,* 31 U. S. (6 Pet.) 515 (1832). *Worcester* has also been recognized as standing, at one time, for the principle of the virtually absolute independence of Indians on-reservation from state regulation. *Arizona v. San Carlos Apache Tribe,* 51 U. S. L.W. 5095, 5100 (U. S. June 28, 1983). However, this Court's more recent decisions have rejected the arbitrary and rigid concepts of jurisdiction based on territorial sovereignty in favor of an analysis of the interests underlying the competing jurisdictional claims of Indian tribes and states. *Williams v. Lee,* 358 U. S. 217 (1959).

The state supreme court concluded in its decision below that the implications of Congress' intent in enacting the jurisdictional statute known as Public Law 280 required North Dakota to close its courts' doors to suits by Indians against non-Indians if the suits arose on an Indian reservation within the state. Alternatively, the state court viewed Congress as consenting, under Public Law 280, to the adoption of a state statute implementing an amendment to the state constitution removing its congressionally-imposed disclaimer clause regarding Indian lands (A. 4a). This is the statute the state court construed as prohibiting state court jurisdiction over Indian claims arising on-reservation.

Petitioner considers as dispositive on this issue this Court's recent decision holding that, as a matter of federal

law, the presence or absence of a congressionally-required disclaimer clause in a state constitution is largely irrelevant as an analytic tool in deciding whether a state has jurisdiction over a specific Indian case or subject matter. *Arizona v. San Carlos Apache Tribe,* 51 U,S.L.W. 5095, 5100 (U.S. June 28, 1983). However, because this Court, in that decision, also indicated that deference should be paid to the construction that state courts place on the disclaimer clauses in their own constitutions, petitioner considers it necessary to show in some detail that North Dakota has no independent state law or policy barring Indian suits against non-Indians in state court. *Arizona v. San Carlos Apache Tribe,* 51 U.S.L.W. 5095, 5099 (U.S. June 28, 1983). Additionally, petitioner considers it necessary to show that there is no express or implied congressional intent behind the enactment of Public Law 280 that prohibits state jurisdiction over petitioner's action. Further, petitioner views the state supreme court's conclusion that Congress consented under that federal statute to the adoption of Chapter 27-19 of the state judicial code as equally erroneous in light of the plain terms of Public Law 280 and the decisions of this Court interpreting that act.

Petitioner submits that based on the repeated declarations by the North Dakota Supreme Court that the state has no independent state law or policy barring Indians from state court, that the sole issue for determination by this Court on review is whether federal law bars petitioner's action against respondent in state court. There is no explicit or implicit congressional intent behind Public Law 280 prohibiting states that did not accept the federal jurisdiction offered under that statute from adjudicating suits by Indians against non-Indians in state court where no significant federal or tribal interests are implicated.

Further, Congress did not intend to consent to, or authorize, under Public Law 280, the adoption of state statutes such as Chapter 27-19 of the North Dakota judicial code that has been interpreted by the state supreme court as completely barring Indian access to state courts if their claims arise on-reservation.

Federal law, and the decisions of this Court, have recognized the right of Indians to sue a non-Indian in state court to obtain a remedy for the wrongs done to them. There do exist special legal principles, based primarily on federal Indian treaties and statutes, that are intended to protect from state intrusion the unique cultural and political arrangements that define Indians as Indians. However, these principles have never precluded an Indian from suing a non-Indian in state court based on a state-created cause of action. It is equally clear that this Court has never allowed a non-Indian to use as a defense to an Indian's claim for relief against him federal principles of law intended solely to protect Indians in their unique status as Indians.

The state jurisdictional rule, embodied in its judicial code, closing its state courts entirely to Indians if their claims stem from an on-reservation transaction is not required by federal law as is supposed by the North Dakota Supreme Court. Indeed, this Court has recognized that where the wrongful conduct of a non-Indian is involved in a case it is entirely appropriate for a state court to assert its interest in regulating the conduct of that person under its state law. Further, while the state supreme court is entirely correct in its observation that a complex relationship exists—one that cannot be adequately described or summarized by a single criterion—between the Indian and the federal government, that relationship

neither requires nor justifies the state's exclusion of Indians from state court.

This state jurisdictional rule, by implication, would allow non-Indians to injure Indians without being answerable in state court. Such a rule would have grave consequences for the protection of the tribes' proprietary interests, especially in commercial transactions. Here, respondent received large sums of monies under a contract with the petitioner to build a public works project on-reservation.

This state jurisdictional rule, purportedly authorized or required by federal law, clearly is inconsistent with the decisions of this Court that have recognized that Indians can sue non-Indians in state court if no federal or tribal interests are violated by such an action. If the state jurisdictional rule is construed as being an independent state law barrier to petitioner's action, then that state law is clearly in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

ARGUMENT

I. North Dakota Has No State Policy Barring Indian Suits Based On State Law Against Non-Indians In State Court

A. Introduction

The state supreme court held in the decision below that North Dakota courts are barred as a matter of federal law from adjudicating Indian claims against non-Indians if those claims arise on a federal Indian reservation in the state. The federal law cited by the state court that ostensibly compels or authorizes the state courts to disclaim subject matter jurisdiction over these suits is the

Act of August 15, 1953, 67 Stat. 588, popularly known as Public Law 280.[1]

B. State Law Authorized Indian Suits Against Non-Indians Before The Enactment Of Chapter 27-19 Of The North Dakota Century Code

The Supreme Court of North Dakota had, prior to the enactment of Chapter 27-19, declared a state jurisdictional rule that allowed state courts to hear Indian suits arising from reservation transactions as long as the suits did not involve Indian lands held in trust by the United States. *See Vermillion v. Spotted Elk*, 85 N. W. 2d 342 (N. D. 1957). The decision in *Vermillion* reflects the state supreme court's consistent opinion that the disclaimer provision in the state's constitution, reading that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States," did not limit state court jurisdiction as long as the litigation did not affect Indian lands. *Id.*, at 438. But see, *William v. Lee*, 358 U. S. 217 (1959).

Therefore, the state supreme court found that its adjudicative authority, absent federal law to the contrary, extended to Indian suits on-reservation because Indians, as state citizens, were entitled to sue in state courts on the same terms as other citizens.

C. The State Court Construed Chapter 27-19 Of The State Judicial Code As Constituting A Federally Authorized Disclaimer Of State Jurisdiction Over All Indian Claims Arising On-Reservation

---

[1]This case involves only Sections 6 and 7 of Public Law 280. Section 7 was repealed by Section 403(b) of Public Law 90-284, Act of April 11, 1968, 82 Stat. 79. Section 6 was reenacted by Section 404 of that Act and is now codified at 25 U.S.C. § 1324. (The full text of the relevant provisions of Public Law 280, including its amendments, is set forth in the Appendix.) (Hereinafter, Public Law 280 shall be referred to as Pub. L. 280.)

The State of North Dakota amended Section 203[2] of its constitution in 1958 in an effort to conform to what it perceived to be the federal jurisdictional requirements contained in Pub. L. 280. The disclaimer provision of the state constitution, after amendment, provided "for the acceptance of such jurisdiction as may be delegated to the State by Act of Congress . . ." N. D. Const. Art. XIII, § 1 (A. 3a). That amendment enabled the North Dakota state legislative assembly to enact such legislation as deemed proper and necessary to conform to the further federal requirements for state assumption of jurisdiction over Indians contained in Section 7 of Pub. L. 280.

The state legislative assembly, in 1963, enacted Chapter 27-19 of the North Dakota Century Code, reciting in the Preamble that the statute was passed in accordance with the provision of Pub. L. 280 "and providing that the jurisdiction of the State of North Dakota shall be extended over all civil causes of action which arise on Indian reservation upon acceptance by Indian citizens in a manner

---

[2]North Dakota was both a so-called "optional" and a disclaimer state under Pub. L. 280's classification scheme. Therefore, not only was it required under Section 6 of that statute to, by appropriate action under state law, remove the disclaimer clause in its state constitution, it was also required to take "affirmative legislative action" concerning either civil or criminal jurisdiction over Indian affairs in order to comply with Section 7 of Pub. L. 280. (A. 5a.)

Section 7 of Pub. L. 280 controls, as a matter of federal law, the issue of what state legislation is sufficient to qualify for adequate acceptance of the federal jurisdictional offer. *See Kennerly v. District Court*, 400 U. S. 423, 425 (1971). North Dakota clearly failed, as a matter of federal law, to accept any of the jurisdictional responsibilities over Indians that were offered to it by Congress under Section 7 of that federal jurisdictional statute. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 493 (1979). North Dakota is now precluded from asserting unilateral jurisdiction over Indian affairs within the state by the repeal of Section 7 by Congress in 1968 and the enactment of 25 U.S.C. §§ 1322(a) and 1326. (A. 6a, 8a.)

provided by this section." N. D. Cent. Code § 27-19-01 (A. 4a).

The North Dakota Supreme Court interpreted the jurisdictional effect of the state legislative steps stemming from what the court perceived as federal authorization contained in Pub. L. 280 in *In re White Shield,* 124 N. W. 2d 694 (N. D. 1963). There, the court held that state courts have no jurisdiction over a proceeding for the termination of parental rights of Indian parents residing on an Indian reservation within North Dakota. The court's rationale for declining jurisdiction in that case was that the state legislature, through the exercise of the authority delegated to it by Congress in Sections 6 and 7 of Pub. L. 280, had disclaimed jurisdiction over that class of actions.

The state supreme court's decisions subsequent to *In re White Shield* expanded what the court perceived to be a federally imposed jurisdictional bar against state court jurisdiction over Indian cases. The jurisdictional rule as elaborated by that court's decision in *Gourneau v. Smith,* 207 N. W. 2d 256 (N. D. 1973)[3] and *Schantz v. White Lightning,* 231 N. W. 2d 812 (N. D. 1975), amounted to a complete bar against state court jurisdiction of civil actions arising on-reservation when the defendant happens to be an Indian.

The Supreme Court of North Dakota repeatedly added in these decisions that North Dakota has no independent policy barring Indian suits by Indian plaintiffs availing themselves of the state's courts as a forum for their actions. However, the court added, federal law, as accepted through the medium of state legislation, closed the state

[3]The North Dakota Supreme Court in this decision also expressly overruled *Vermillion v. Spotted Elk,* 85 N. W. 2d 342 (N. D. 1957).

courts to suits against Indian defendants. *Cf., Rolette County v. Eltobgi*, 221 N. W. 2d 645 (N. D. 1974).[4]

Despite these decisions by the state supreme court barring state court adjudication of actions involving Indian defendants, it had been presumed that there was no jurisdictional bar against Indian plaintiffs suing non-Indian defendants in state courts regardless of the situs of the action.[5] *See generally, Rolette County v. Eltobgi*, 221 N. W. 2d 645, 648 (N. D. 1974); *White Eagle v. Dorgan*, 209 N. W. 2d 621 (N. D. 1973). However, the North Dakota Supreme Court in the decision on review here extended its rationale regarding the perceived federal bar to state jurisdiction over any actions arising on-reservation to the new fact situation wherein an Indian plaintiff sues a non-Indian defendant in a civil cause of action arising from a reservation transaction.

The North Dakota Supreme Court relies directly on Pub. L. 280 in reaching its result in this case:

> Likewise the people of North Dakota and the Legislature were acting under explicit authority granted by

---

[4]The Eighth Circuit Court of Appeals in *Poitra v. Demarrias*, 502 F. 2d 23 (8th Cir. 1974), *reversing*, 369 F. Supp. 257 (D.N.D. 1973), relied on the repeated declarations by the state of North Dakota Supreme Court that North Dakota had no state policy against the Indians suing in state court. On the contrary, the court of appeals found that, absent the perceived federal bar contained in Pub. L. 280, the North Dakota Supreme Court's opinion is that state courts are open to Indians. *Poitra*, at 27.

Therefore, the appeals court found that no state policy would be offended by allowing a diversity suit between two Indians stemming from a reservation transaction and with facts very similar to those presented in *Gourneau v. Smith*, 207 N. W. 2d 256 (N.D. 1973).

[5]See Kutner, *Can Federal Courts Remain Open when State Courts are Closed? Erie Tompkins on the Indian Reservation.* 52 N.D. L. Rev. 647 (1975).

> Congress in the exercise of its federal power over Indians when our Constitution was amended and Chapter 27-19 N.D.C.C. was enacted. We therefore find no equal protection violation of the Constitution of either the State or the United States, and for the reasons stated in this opinion, affirm the judgment of the district court. 321 N. W. 2d at 513.

The general jurisdictional rule after this decision is that the North Dakota courts lack jurisdiction over any case arising on a federal Indian reservation in North Dakota and involving an Indian as either party. This bar to state court jurisdiction arises, according to the state supreme court, as a matter of federal law. There is no independent state policy barring state court jurisdiction over Indian suits in state court.

II. Federal Policy Does Not Require An Absolute Bar Against State Judicial Jurisdiction Over Suits By Indians Against Non-Indian Defendants Under State Law Where No Interference With Federal Or Tribal Interests Is Involved

A. North Dakota Has Adopted Federal Law As The Governing Limit On Its Judicial Power Over Indians

The North Dakota Supreme Court regarded federal Indian law, particularly Pub. L. 280 and the decisions of this Court interpreting that statute, as compelling or authorizing the result below. According to the supreme court's rationale, the state legislature, in enacting Chapter 27-19 of the Century Code, adopted directly whatever jurisdictional limitations Pub. L. 280 imposed directly, or as a matter of interpretation by this Court, as a substantive jurisdictional rule binding on the state courts.

The commendable intent of the North Dakota legislature to achieve judicial administration consistent with federal law by requiring the state courts to read the meaning of Chapter 27-19 through this Court's interpretation of Pub. L. 280 cannot be denied. However, once the state legislature chose to link, by statute, its judicial jurisdiction directly to the federal law in that area as the applicable limitation on state power, then the state statute's validity and the permissible scope of its interpretation is a matter of federal law. *See Breisch v. Central R.R.*, 312 U. S. 484, 491 (1941); *Tipton v. Atchison T. & S. F. Ry.*, 298 U. S. 141, 151-152 (1936).

The state supreme court's construction of Chapter 27-19 of the state judicial code imposes an absolute jurisdictional bar against Indian suits arising on-reservation. That bar, according to the state court, is derived from the federal authority contained in Pub. L. 280. That court, in its decision below, construed Pub. L. 280 as the federal statute authorizing North Dakota to adopt the jurisdictional rule represented by Chapter 27-19 of the North Dakota Century Code. Additionally, the state supreme court also read that federal statute as imposing, through the derived state statute, an absolute bar against state jurisdiction over Indian causes of action arising on-reservation until the Indians consent as a matter of state law to such state jurisdiction.

However, petitioner submits that neither the plain terms of Pub. L. 280 or its legislative history establishes a federal jurisdictional rule prohibiting the state courts of North Dakota from exercising jurisdiction over petitioner's private cause of action against a non-Indian engineering firm. Nor does the statute or a reading of its

legislative history support the state court's conclusion that Congress consented under Pub. L. 280 to the state's enactment of Chapter 27-19 of the state judicial code.

B. North Dakota's Failure To Accept Public Law 280 Jurisdiction Does Not Bar The Tribe's Negligence Action Against A Non-Indian In State Court

The state supreme court, in its decision below, reasoned that because North Dakota failed to accept the federal government's offer of jurisdiction over Indian affairs contained in Pub. L. 280—coupled with the state legislature's enactment of Chapter 27-19 of the state judicial code—that the state's courts are compelled to disclaim any jurisdiction over Indian claims arising on an Indian reservation in North Dakota. The state court's construction of the state law can be sustained only if Congress meant, in Pub. L. 280, to radically limit the territorial extent of state law. Additionally, Congress would have to have intended to deprive states that did not accept Pub. L. 280 jurisdiction of any jurisdictional authority at all over Indian claims if they arose within the boundaries of a reservation within those states.

However, both the legislative purpose of Congress in enacting Pub. L. 280, as well as the context of that statute, shows that the phrase "civil jurisdiction" as used in that statute has a clear and unmistakable referent quite apart from the existing state civil jurisdiction over actions such as the one at issue here. The underlying legislative history of the act emphasizes that it was intended to serve two larger goals of Congress: the termination throughout the United States of the subjection of Indians to special federal laws applicable only to Indians and the withdrawal of federal responsibility for Indian affairs wherever practicable.

The legislative documents show that Congress considered, as a necessary step prior to the transfer of any jurisdiction to the states by way of a federal transfer agreement, the repeal of the existing federal statutory status of Indians by eliminating the existing federal statutes referring specially to them and thereby setting them apart from other citizens.[6] The purpose of such a repeal was the abolishing of certain restrictions deemed discriminatory. *H. Rep.* No. 848, at 5.

Subsequent to this repeal, Congress would then be free to transfer its special authority over Indian affairs, in the civil law area as well as criminal, by permitting state courts to adjudicate civil controversies arising on-reservation and to extend to those reservations the sub-

---

[6]The documents referred to are:

(1) H. Rep. No. 848, accompanying H.R. 1064, A Bill Amending Title 18, United States Code, Entitled, "Crimes and Criminal Procedure," with Respect to State Jurisdiction over Offenses Committed by or against Indians in Indian Country and to Confer on the State of California Civil Jurisdiction over Indians in the State, 83rd Congress, 1st Sess. (July 16, 1953) (hereinafter cited as H. Rep. 848).

(2) Senate Report No. 699, accompanying H. R. 1063, A Bill Conferring Jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with Respect to Criminal Offenses and Civil Causes of Action Arising within Such States, 83rd Congress, 1st Sess. (July 29, 1953) (hereinafter cited as S. Rep. No. 699).

(3) Transcript of Hearings on H.R. 1063 before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 83rd Congress, 1st Sess. (1953). Those hearings have not been published, but the copies of the transcripts have been lodged with the Clerk of the Court. The June 29 transcript will hereinafter be cited as Hearing *Transcript I*, and the July 15 transcript will hereinafter be cited as Hearing *Transcript II*.

stantive civil laws of the respective states.[7] *S. Rep. No. 699*, at 5.

The testimony at the hearings on H. R. 1063, that as amended would become the basis for Pub. L. 280, was unabashedly in support of the proposed legislation as representing

> . . . a definite step forward in the inclusion into the general body of the Indians of that state with respect to civil and criminal jurisdiction so that they would be subject to the same laws and the same rules as other citizens. *Transcript I*, at 5 (statement of Harry A. Sellery, Jr., Chief Counsel, Bureau of Indian Affairs).

Testimony—it appears that no Indian leaders testified on the merits of this bill—was virtually unanimous that the limited relinquishment of the special federal power over Indian affairs and the general subjection of the Indians to state civil and criminal authority of the states would contribute directly to assimilation of the Indian into the larger social and political society of the United States. The bulk of the legislative record is concerned with one identified evil—the problem of inadequate law enforcement on reservations. *Goldberg*, at 555-558.

Congress hoped to enlist the states, via the exercise of their newly conferred authority over Indian affairs within their states, to assist the federal government both in the cure of the inadequate law enforcement on reserva-

---

[7] The legislative history of H.R. 1063 also reflects its evolution from a bill intended to accomplish the limited purpose of the transfer of federal criminal jurisdiction to one state, California, to a general bill covering all states and authorizing them to assume, with certain important restrictions on their civil authority, criminal and civil authority over Indian affairs within their states subject to the terms of proposed legislation. Goldberg, *Public Law 280: The Limits of State Jurisdiction over Reservation Indians*, 22 U.C.L.A. L. Rev. 535, 540-544 (1975) (hereinafter cited as *Goldberg*).

tions and accomplishment of the broader goal of assimilation of the Indian into American society. *Bryan v. Ithasca County,* 426 U. S. 373, 387 (1976).

The phrase, civil jurisdiction, as used in the context of the legislative history of Pub. L. 280, refers directly to that special constitutional power conferred on Congress to legislate with respect to Indians in their status as Indians. That power exists in the federal government as a matter of constitutional necessity. *United States v. Kagama,* 118 U. S. 375, 384-385 (1886). Congress has exercised its power over Indian affairs on numerous occasions to enact a special body of statutory law to regulate Indian affairs. However, at the same time, Congress also has enacted statutes conferring general citizenship status on Indians so as to secure to them the general rights available to all other citizens under the Constitution and laws. 8 U. S. C. § 1401(2) (1978).

The legislative history of Pub. L. 280 clearly refers to the special statutory status of Indians created by Congress in the exercise of its authority over Indian affairs. It is this special body of law that witnesses before the Interior Committee thought should be abolished because the laws were discriminatory. *H. Rep. No. 848,* at 3.

Therefore, the proposed repeal of these ostensibly discriminatory statutes is closely correlated with the proposed transfer of federal jurisdiction to the states "permitting the state courts to adjudicate civil controversies arising on Indian reservations, and to extend to those reservations the substantive civil laws of the respective states." *S. Rep. No. 699,* at 5. The reason for this close correlation of the repeal of the federal statutes peculiar

to Indians and the grant to the states of civil authority within that area seems clear enough: Congress wanted to remove the preemptive effect of statutes or treaties that might conflict with the states' exercise of jurisdiction in that limited area of delegation.

That the grant of civil jurisdiction Congress intended to confer on the states via Pub. L. 280 must be read *in paria materia* with the existing federal Indian law and treaties so as to define the federal subject matter jurisdiction being transferred to the states is made clear from the Ninth Circuit Court of Appeals decision in *Anderson v. Gladden*, 293 F. 2d 463 (9th Cir. 1961). Although that decision deals with the criminal jurisdictional section of Pub. L. 280, the same underlying principles of statutory construction govern the nature of the federal civil jurisdiction grant offered to states such as North Dakota:

> The power over Indians was deemed not so inherently or exclusively federal as to apply beyond the extent to which the federal government has preempted the field, and the federal government could thus withdraw from the field and turn the subject matter back to the states when it chose to do so. *Id.*, at 468.

Public Law 280 has been construed as effecting only a limited withdrawal of federal control or preemption in specific subject matter areas so that the states accepting jurisdiction under that statute would be free to exercise their legislative or judicial jurisdiction in those same areas. The major congressional study of the results of Pub. L. 280 confirms that both lower federal courts and state courts have construed the purpose of that statute the same way as did the appeals court in the *Gladden* decision. *Background Report on Public Law 280*, prepared at the request of Henry M. Jackson, Chairman, Committee on Interior

and Insular Affairs, United States Senate, 94th Cong., 1st Sess., at 38 (hereinafter cited *Background Report on Pub. L. 280*), citing *Robinson v. Wolff*, 349 F. Supp. 514, *aff'd.*, 468 F. 2d 438 (8th Cir. 1972); *Agua Caliente Band of Mission Indians v. Palm Springs*, 347 F. Supp. 42 (C. D. Cal. 1974); *Robinson v. Sigler*, 187 N. W. 2d 756 (Neb. 1971), *appeal dismissed*, 404 U. S. 987 (1971). Public Law 280 has consistently been construed as not intending to affect the existing state jurisdiction over actions under state law where non-Indians are the defendants. *Background Report on Pub. L. 280*, at 43.

This Court has held that states that accepted such special subject matter jurisdiction under Pub. L. 280 were thereby empowered to exercise their legislative and judicial jurisdiction in certain areas where the Constitution, statutes, treaties, and federal Indian common law had previously preempted such state authority. *Washington v. Yakima Indian Nation*, 439 U. S. 463, 479 (1979). (This Court rejected the tribe's claim that Pub. L. 280 had not abrogated the tribe's right to self-government under treaty.)

By contrast, however, the state court below read the phrase "civil jurisdiction," as used in Pub. L. 280, as encompassing not only such special federal jurisdiction, but as encompassing all jurisdiction over civil causes of action arising on a reservation and involving Indian parties as either plaintiff or defendant. Congress, according to the state court's view, intended either a broad grant or territorial jurisdiction over the reservation under Pub. L. 280 to the states if they accepted such authority or to prohibit entirely the state's exercise of jurisdiction over Indians if the states failed to accept that transfer of authority.

Thus, the state court reads Pub. L. 280 in its decision below as offering to the states a broad grant of jurisdiction conceived of in terms of territorial extent as against a limited grant of jurisdiction relating to a specific subject matter. Further, the court concludes that the state statute, Chapter 27-19, amending its judicial code, constituted a rejection of Pub. L. 280 jurisdiction and a prohibition against the exercise of state civil jurisdiction over all causes of action arising on a reservation and involving Indians in any way. 321 N. W. 2d 510, at 512 (N. D. 1982).

However, the legislative record of Pub. L. 280 reveals that state action under Pub. L. 280, either in accepting or rejecting the federal offer of jurisdiction, was not intended to have such a disruptive effect on the existing state law systems. The Chief Counsel, Mr. Abbott, proposed to the House Committee on Interior and Insular Affairs, certain amendments to H. R. 1063 so that the proposed legislation could be transformed into a general statute whereby all states could acquire federal power to control some aspect of Indian affairs within their respective states. The purpose of such amendments was to provide a general statutory mechanism whereby the United States could cede its authority, subject to restrictions not relevant here, to the states. Such a procedure, however, had to take into account certain historical and legal factors that set some of the Western states apart from other states. The Committee's Chief Counsel pointed out that these states had so called disclaimer provisions, both in the enabling acts admitting them to the Union and in their own state constitutions. Therefore, counsel recommended that certain procedural amendments be adopted to meet their situation and to enable them to participate in the Pub. L. 280 program. Consequently,

> . . . the bill as acted upon by the Committee makes provision for eight states which have constitutional organic impediments for accepting state jurisdiction, the enabling acts for Arizona, Montana, New Mexico, North Dakota, South Dakota, Oklahoma, Utah, and Washington, provided that exclusive federal jurisdiction would be retained. *Transcript II,* at 2-3.

Such state disclaimers, the Chief Counsel concluded, would disable those eight states from accepting the contemplated federal offer of jurisdiction under the proposed act and would consequently defeat the general applicability of the act. Therefore, the Chief Counsel advocated certain procedural amendments to the legislation that would avoid that result. Congress, under the proposed amendments, would consent to any of those eight states removing the disclaimers in their constitutions so as to enable them to accept the offered federal jurisdiction. That the purpose of these amendments was solely to authorize the removal of a perceived federal barrier to the acceptance of such jurisdiction as would be offered by the Act is made clear in the exchange regarding the effect of the proposed amendments:

> Mr. Dawson: One thing you can be assured of, *the state would not be harmed by this provision,* because you are simply giving them the right to pass legislation if they see fit to do so. (emphasis added)
>
> Mr. Pillion: It would not *increase* their jurisdiction automatically. (emphasis added)
>
> Mr. Dawson: No, anymore than it will Nevada's. If Nevada does not want to take this expense, they certainly do not need to pass any legislation to take it on. *Transcript II,* at 13.

Petitioner submits Congress' desire to achieve nationwide generality in the application of the new statute, Pub. L. 280, explains fully the procedural amendments to that

Act allowing disclaimer states such as North Dakota to amend their state constitutions and thus remove a federally-imposed disability. It was not intended, as the state court interprets it, to have a substantive effect, as a congressional prohibition of state civil jurisdiction over state court actions that are outside the limited, special Indian subject matter areas controlled by Congress.

Such a construction of that statute would be in direct conflict with the statute's larger purpose: to assimilate the Indian into the general society. Allowing the state to completely cut off Indian access to state court through legislative action under Pub. L. 280 would be inconsistent, to say the least, with that federal goal. Additionally, Congress did not intend to diminish the existing rights of Indians to state court under state law through any action purportedly authorized by Pub. L. 280.[8]

Therefore, the state court's result below depends on a number of interlocking assumptions that, viewed in light of the legislative history of Pub. L. 280, turn out to be false. The first assumption that the phrase "civil jurisdiction," as used in the statute, refers to all and any exercise of state judicial authority over all Indian claims aris-

---

[8]Article I, § 22 of the North Dakota Constitution provided that all the courts shall be "open to every man" and that he shall have a remedy by due process of law "for any injury done to him." (A. 2a.) This state-declared right of access to the state's courts is presumably protected and secured to Indian citizens by the due process clause of the Fourteenth Amendment of the United States Constitution. *C.f., Mobile & Ohio Railroad v. Tennessee,* 153 U. S. 486, 506 (1894).

The power to regulate jurisdiction is the power to regulate rights. If Congress had intended by Pub. L. 280 to withdraw absolutely from state cognizance all subject matter jurisdiction over such claims without creating any federal forum for the vindication of those same rights, then serious constitutional issues would arise. *Murray's Lessee v. Hoboken Land and Improvement Co.,* 18 U.S. (How.) 272, 284 (1856).

ing on-reservation is patently false. The legislative record makes clear that the phrase "civil jurisdiction" refers to state authority that could not have been previously exercised by the state courts because federal authority had pre-empted the subject matter jurisdiction of the state courts in that area. The joint repeal of such federal statutes or treaties and the grant to the state of federal civil authority would authorize the state to exercise jurisdiction in certain subject matter areas where it would otherwise be preempted from doing so. *Washington v. Yakima Indian Nation,* 439 U. S. 463, 479 (1979).

The state court's second assumption that North Dakota, by refusing to assume jurisdiction of Indian affairs under Pub. L. 280, was then enabled by congressional consent to enact Chapter 27-19 of its judicial code and thereby remove all jurisdiction over any Indian claims arising on a reservation in that state is not supported by any congressional intent at all. The Indian, as an aspect of his citizenship rights protected by the Fourteenth Amendment, is entitled along with other state citizens to sue in state court to protect his property rights. *See Bird v. Terry,* 129 F. 472, 477 (C.C.W.D. Wash. 1903); *Deere v. New York,* 22 F. 2d 851, 853 (N. D. N. Y. 1927). There is not a shred of evidence in the legislative record of Pub. L. 280 that Congress intended as a consequence of a state's nonacceptance of the federal civil jurisdiction offered under that statute that its Indian citizens could be deprived of their right to access to state court to protect their rights on the same terms as other state citizens.

On the contrary, this Court's decisions support the proposition that state action, either accepting or rejecting the grant of Pub. L. 280 jurisdiction, must be read with reference to what Congress intended to grant to the states

under that statute. This Court, in *McClanahan v. Arizona Tax Commission,* 411 U.S. 164 (1973), held that Pub. L. 280, as amended, conferred upon the states "the right to disregard enabling acts which limit their authority over Indians," *McClanahan,* at 177. Since Arizona, like North Dakota here, never complied with the Act, it had no authority to impose its income tax statutes on a reservation Indian. However, this Court also pointed out that Indians, as citizens, have the right of access to state courts. *McClanahan,* at 173. Thus, there is no relationship between North Dakota's failure to accept Pub. L. 280 jurisdiction and the Indian's right of access to state court as a citizen. This conclusion is confirmed by this Court's recent decision holding that Pub. L. 280, aside from the specific sections prohibiting state jurisdiction over particular subject matter, has little bearing on whether a state has jurisdiction over a particular Indian case or subject matter. *Arizona v. San Carlos Apache Tribe,* 51 U.S.L.W. 5095, 5099 (U.S. June 28, 1983).

Further, the state court's interpretation of Pub. L. 280 imposes new and novel conditions not contemplated by Congress. These conditions, far from being authorized by that federal statute or consistent with its purpose, is in fact an unauthorized attempt to defeat the clear Congressional purpose expressed in Pub. L. 280. Recently, the State of Nebraska sought to deny the effectiveness of its prior state consent to the retrocession by the state of the special federal jurisdiction it had received over a reservation under Pub. L. 280 by imposing subsequent state conditions on that consent. The federal district court held that it was impermissible for a state to attempt to defeat or interfere with the workings of the federal retrocession process established by Section 403 of Pub. L. 280, 25 U.S.

C. § 1323, as amended, through the imposition of additional state conditions intended to defeat its earlier consent. *Omaha Tribe v. Walthill*, 334 F. Supp. 823, 831 (D. Neb. 1971), *aff'd.*, 460 F. 2d 1327 (8th Cir. 1972).

Here, the state condition that defeats Pub. L. 280's larger purpose is the requirement that Indians consent to full jurisdiction by the state over the reservations before they can sue to protect any on-reservation property interest in state court. That state condition conflicts with Pub. L. 280's larger purpose of assimilating the Indian into state society. Congress, through Pub. L. 280, wanted the states to affirmatively act to assume jurisdictional responsibilities over the Indian that would foster his acculturation—not to impose barriers to state court by way of consent requirements that operate to take away his existing rights under state law. *See generally, Kennerly v. District Court*, 400 U. S. 423 (1971). Also, this Court has held that the limited civil jurisdictional effect of Pub. L. 280 was to allow Pub. L. 280 states to apply their own rules of decision in suits involving reservation Indians. *Bryan v. Ithasca County*, 425 U. S. 373, at 384, 385 (1976).

Public Law 280 is therefore simply irrelevant to the determination as to whether the North Dakota state courts have jurisdiction over petitioner's negligence action. *Arizona v. San Carlos Apache Tribe*, 51 U.S.L.W. 5095, 5099 (U. S. June 28, 1983).

C. There Is No Federal Decisional Rule Barring Petitioner's Action In State Court

State court is the proper forum for the adjudication of this action. The appropriate analytic approach in determining whether a North Dakota state court can hear the Tribe's claim against a non-Indian was established by

this Court in *William v. Lee*, 358 U. S. 217 (1959). This Court disallowed, in *Williams*, state court jurisdiction over a non-Indian claim for a debt against a Navajo Indian. The proper forum for adjudication of that claim was tribal court, not state court. This Court found that the federal policy of encouraging and strengthening tribal courts, as well as the fact that the Navajo Court of Indian Offenses was open to non-Indians and could hear debt actions, tipped the jurisdictional balance in favor of tribal court jurisdiction and against state court jurisdiction. *Williams*, 358 U. S. at 222.

Conversely, this Court has held that where a non-Indian's conduct is at stake, as it is here, a state may assert both its legislative and judicial jurisdiction to regulate such behavior as long as it does not infringe on protected tribal or federal interests. *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164, 172-173 (1973).

There is no federal decisional rule that bars petitioner's action in state court. On the contrary, generally in matters not affecting the federal government or tribal regulation, an Indian has the same status to sue in state court as any other citizen. F. S. Cohen, *Handbook of Federal Indian Law* (1971 Reprint, University of New Mexico Press), at 379. This rule has been maintained by this Court over the years without fundamental alteration. *Felix v. Patrick*, 145 U. S. 317 (1982); *Williams v. Lee*, 358 U. S. 217 (1959).

Felix v. Patrick involved a suit by Indians to recover scrip allegedly taken by fraud. The action was not brought until 27 years after the fact. In response to the defense of laches, plaintiffs argued that as Indians they were not United States citizens and therefore not able to sue in federal courts. This Court rejected that contention:

> It is scarcely necessary to say in this connection that, while until this time they were not citizens of the United States, capable of suing in the Federal Courts, the Courts of Nebraska were open to them as they are to all persons irrespective of race or color. *Id.*, 145 U. S. at 332.

This early decision holding that Indians are presumed to have access to state courts as part and parcel of those citizenship rights that they share with other state citizens, has many times been reaffirmed by this Court. Only recently this Court, in *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973), declared its position that there is no federal barrier to suits brought by Indians against non-Indians in state court. *McClanahan*, 411 U. S. at 172-173.

There is not one decision of this Court that supports the state supreme court's decision below barring, as a matter of federal law, suits by Indians against non-Indians in state courts on essentially state-created rights of action. Instead, this Court has indicated that state courts have an important role to play in providing both right and remedy for Indian plaintiffs who sue non-Indian defendants.

The present principles applied by this Court in cases involving non-Indians reflect a rejection of arbitrary and rigid jurisdictional limits based on claims of territorial sovereignty by either states or tribes. Instead, this Court has favored jurisdictional principles that are based on considerations of fairness and the furtherance of legitimate interests of both the state and tribe that are asserting jurisdiction over the action. *Williams v. Lee*, 358 U. S. 217 (1959); *Fisher v. District Court*, 424 U. S. 382 (1976).

The state court's decision here on review represents a wooden approach to state jurisdiction in Indian affairs based on a territorial concept of jurisdiction. That concept is used here to defeat absolutely Indian claims against non-Indians in state court. The governing jurisdictional principles that this Court has declared are far more flexible by comparison and are adapted to the protection of Indian and non-Indian litigants' rights in the most appropriate forum for their resolution:

> . . . cases applying the *Williams* test have dealt principally with situations involving non-Indians. (citations omitted) In these situations, both the tribe and the state could fairly claim an interest in asserting their respective jurisdictions. The *Williams* test was designed to resolve this conflict by providing that the state could protect its interest up to the point where the tribal government would be affected. *Id.*, at 179.

The state court below cites this Court's decision in *Williams* as requiring the imposition of an absolute jurisdictional bar against state jurisdiction over Indian claims arising on-reservation. *Gourneau v. Smith*, 207 N. W. 2d 256, 259 (N. D. 1973). The *Williams* principle did not prohibit state jurisdiction over Indians or their claims. The *Williams* principle, as elaborated by this Court, has as its purposes the protection of two important interests. First, that rule is intended to prevent the operation of state law that would interfere with the effective discharge of responsibilities that Congress has assumed with respect to Indians and Indian affairs. Consequently, this Court has disallowed the imposition by the State of Arizona of its income tax on the sales to Indians of an Indian trader on the Navajo Indian Reservation. *Warren Trading Post v. Arizona's State Tax Commission*, 380 U. S. 685 (1965). This Court emphasized the federal in-

terest involved as evidenced by the historical control and regulation of Indian traders on-reservation. The imposition of a state tax, and its collection especially, could, this Court held, burden or frustrate the congressional interest in ensuring that no burden was placed on Indian tribes under federal supervision. *Id.*, at 691.

Second, the *Williams* rule is intended to protect Indian tribes and their members from the possibility of abusive state legislative action. Thus, this Court has rejected the efforts of state tax authorities to impose their income tax laws on an Indian who received all his income on-reservation. *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164 (1973).

Nonetheless, the state court below has inferred from the decisions of this Court that it must automatically dismiss any Indian claim arising on a reservation. The court below has seriously misread the meaning of this Court's decisions. Those considerations that required the results in *Williams*, *Warren Trading Post*, and *McClanahan* are absent here. There are no competing federal or tribal interests that would defeat state judicial jurisdiction over petitioner's claim against a non-Indian. The tribe here has not asserted, through its tribal constitution, civil jurisdiction over non-Indians. *Quechan Tribe v. Rowe*, 531 F. 2d 408 (9th Cir. 1976). Presumably, the State of North Dakota has an interest in regulating a non-Indian's conduct where it is at issue in a case. Further, respondent here is defending this action in the state court under state law standards that generally govern the conduct of his business dealings.

The state supreme court has misapplied the federal standard developed in *Williams* in interpreting that rule as to require an absolute bar against Indian claims when

those claims implicate no overriding federal or tribal interests in any way.

III. Congress Did Not Consent To, Or Authorize North Dakota's Enactment Of Chapter 27-19 Of Its Judicial Code

A. Congress Imposed, Through Section 7 Of Public Law 280, Strict Requirements That North Dakota Failed To Meet

Congress consented, under Section 7 of Pub. L. 280, to the "affirmative assumption of state jurisdiction" over Indian affairs within the subject matter areas outlined by that federal statute. *Washington v. Yakima Indian Nation*, 439 U. S. 463, 486, ft. n. 30 (1979). Chapter 27-19 of the state judicial code does not constitute an assumption of jurisdiction at all (A. 4a). Instead, that legislation requires tribal consent, and in some instances the individual's consent, prior to the state's assumption of any jurisdiction under Pub. L. 280. This is expressly the kind of state legislative scheme that this Court has identified as failing to meet the strict federal requirements of "affirmative state legislation" under Section 7 of the Act. *Kennerly v. District Court*, 400 U.S. 423 (1971).

Congress imposed, in Section 7 of Pub. L. 280, a clear standard that states such as North Dakota had to comply with in order to receive any delegated powers from the federal legislature. *United States v. Chicago R.I.&P.R. Co.*, 282 U.S. 311, 324 (1931).

This Court has ruled, in the enforcement of that standard, that the eligible states must, in order to comply with the strict requirements of Section 7, manifest by political action their willingness and ability to discharge their new responsibilities. *Washington v. Yakima Indian Nation*, 439 U.S. 463, 486-487. This political action must be evidenced by "affirmative legislative action"

binding the state to accept jurisdiction over Indian affairs within its state. *Kennerly v. District Court,* 400 U. S. 423, 427 (1971).

The state supreme court, construing Chapter 27-19 of its state judicial code, concluded that North Dakota, far from affirmatively accepting any delegated jurisdiction under Pub L. 280, intended by the state act to reject any jurisdiction it may have had prior to Pub. L. 280's date. Therefore, the state court's interpretation of this Court's decision in *Washington v. Yakima Indian Nation,* 439 U.S. 463, 500 (1979), as impliedly sanctioning the jurisdictional rule or pattern declared in the decision below is seriously in error. This Court found there that Washington had effectively accepted the jurisdictional offer contained in Pub. L. 280 and had partially assumed the jurisdictional responsibilities of the federal government in Indian affairs as intended by that statute. This Court further held in *Yakima* that Washington, in the exercise of its federally-delegated authority, could shelter under the plenary authority Congress enjoys over Indian affairs against the Tribe's equal protection challenge to Washington's jurisdictional scheme. *Id.,* at 501.

Here, North Dakota has attempted to repudiate any jurisdictional responsibilities under the federal statute. The state court concludes that such a repudiation has been consented to by Congress in Pub. L. 280. However, its scheme, as represented by Chapter 27-19 of its judicial code, is of the express type disapproved by this Court as being insufficient to meet the standards contained in Section 7 of the Act in *Kennerly v. District Court,* 400 U.S. 423 (1971). State courts have likewise recognized that Section 7 of Pub. L. 280 requires affirmative state legislation in order to confer any federal jurisdictional authority on the states under that federal statute. *See*

generally, State v. Molash, 199 N.W.2d 591 (S.D. 1972); *Morgan v. Colorado River Indian Tribe,* 436 P.2d 484 (Az. 1968), *vacated on other grounds,* 443 P. 2d 421 (1968); *Whyte v. District Court,* 346 P. 2d 1012 (Colo. 1959), *cert. denied,* 363 U. S. 829 (1960).

Consequently, the fundamental condition for the validity of the state jurisdictional pattern—set forth at Chapter 27-19 of the state judicial code—as a federally delegated exercise of jurisdiction over Indians is that the state comply with Section 7 of Pub. L. 280. This Court's decision in *Kennerly* confirms that North Dakota did not. The state's failure to comply with the plain requirement of Section 7 of the federal statute defeats the state court's contention that the state statute is a federally-sanctioned jurisdictional rule compelling the Indians to consent to state jurisdiction before they can have access to state courts. *Washington v. Yakima Indian Nation,* 439 U. S. 463, 500 (1979).

The state statute, Chapter 27-19 of the N.D.C.C., given that it represents neither a federally-compelled or authorized federal judicial rule over Indian affairs, then did not alter, as a matter of federal law, the existing state judicial authority before the enactment of Pub. L. 280. That Congress did not intend to disrupt the underlying state judicial authority to hear Indian claims against non-Indians by the passage of that federal statute is confirmed by later congressional assessment of Pub. L. 280's purpose and impact. *Background Report on Public Law 280,* at 38.

B. Congress by its 1968 amendments to Public Law 280, has rendered moot the state court's assumption that petitioner must consent, as a matter of federal law, under Chapter 27-19 of the state judicial code as a prerequisite to state court's jurisdiction over petitioner's action.

The state statute cannot serve as a federally-approved jurisdictional rule to control Indian access to state court in the light of the 1968 amendment to Pub. L. 280. *See Background Report on Public Law 280*, at 27-37.

The reason Congress changed Pub. L. 280 radically in 1968 is clear from the legislative history of the 1968 amendments. Pub. L. 280, by all accounts, proved to be a total failure. Congress had hoped that many of the so-called "optional" states such as North Dakota would come forward and take over where the federal government would leave off in the affirmative governance of Indian affairs, especially in the law enforcement area.[9] Com-

---

[9]In any event, the lack of success in Pub. L. 280's assimilation of the American Indian into the broader civil society was due, at least in part, to the states' unwillingness to accept the burden of law enforcement on the reservations. Burnette, *An Historical Analysis of the 1968 Indian Civil Rights Act*, 9 Harv. J. on Legislation 557, 587 (1972) (hereinafter cited as *Burnette*). By the early 1960s it became increasingly clear to some congressmen that Pub. L. 280 had failed as a tool to resolve the problems that it was intended to resolve. About that time, in 1961, Senator Sam Ervin began a series of congressional field hearings, through the Senate Judiciary Subcommittee, on the legal status of the Indian and the problems he encountered when he asserted his constitutional rights in his relations with state, federal, and tribal governments. See S. Rep. No. 841, accompanying S. 1843, 90th Cong., 1st Sess. (Dec. 6, 1967) (This report distills the essence of the testimony received in the series of the field hearings and also summarizes the legislative history of predecessor bills to S. 1843.)

The hearings, that included extensive tribal testimony, convinced Senator Ervin of the need for the amendment of Pub. L. 280—especially the imposition of a tribal consent requirement as a matter of federal law prior to any assumption of state jurisdiction under that law. See S. Rep. 841, at 10-11. See also Hearings before the House Subcommittee on Indian Affairs, on H.R. 1519, 90th Cong., 2d Sess. (March 29, 1968).

Although Senator Ervin had proposed tentative bills aimed at amending Pub. L. 280 prior to 1968, those bills were markedly unsuccessful before the House Committee on Interior and Insular Affairs. One commentator concluded that the reason for this lack of success can be assigned to the presence of powerful opposition from representatives from some western states

(Continued on next page)

mentators suggested that one reason for the failure of Pub. L. 280, though by no means the only reason, was the states' reluctance to assume the associated costs attributable to becoming the primary authority responsible for governance of Indian affairs in the jurisdictional areas covered by that federal statute. *See Goldberg,* at 551-558. Whether this factor entered into North Dakota's decision not to accept any Pub. L. 280 jurisdiction over the Indian reservations within its boundaries is not clear from the scanty legislative record behind that state's constitutional amendment or its legislative enactment, Chapter 27-19 of its judicial code in 1963.

The new Indian Civil Rights Act, enacted as a title of a larger general civil rights act, repealed Section 7 of Pub. L. 280 and replaced it with an exclusive federal procedure requiring Indian consent, whereby states in the future could acquire jurisdiction over Indian affairs. 25 U. S. C. §§ 1321-1326 (1983) (A. 6a, 7a, 8a).

Subsequent to these amendments, a state may acquire delegated federal jurisdiction in the special subject matter areas covered by Pub. L. 280 only by strict compliance

---

(Continued from previous page)

who wished to see Pub. L. 280 remain intact so as to provide a tool for state control of certain aspects of reservation activity. *See Burnette,* at 606.

Therefore, Senator Ervin was unable to realize his goal of protecting the constitutional rights of Indians and amending Pub. L. 280 until 1968, when he was able to tack his Indian bill, S. 1843, onto the proposed 1968 Civil Rights Act, H.R. 2516. The public clamor, both for and against the broader civil rights legislation, provided an opportunity for Senator Ervin to either amend H.R. 2516 into defeat, counting on strong western opposition in the House against the Indian Rights Bill, or to have it pass the House with his Indian bill of rights attached. Unfortunate broader historical and social events, such as the slaying of Dr. Martin Luther King, compelled Congress to act on the broad 1968 Civil Rights Act without undue delay, and the opposition to the Indian rider on H.R. 2516 was simply overwhelmed. *See Burnette,* at 604-611.

with 25 U.S.C. §§ 1321-1326. *Kennerly v. District Court*, 400 U. S. 423 (1971). Tribal consent to such a proposed state assumption of jurisdiction is effective only if manifested in accordance with the provisions of 25 U. S. C. § 1322(a). *Kennerly*, at 427. Consequently, tribal consent under Section 27-19-02(1) or (2) of the North Dakota judicial code to the state's assumption of jurisdiction over the reservation under Pub. L. 280 would be entirely meaningless (A-4a). *Cf., Nelson v. Dubois*, 232 N. W. 2d 64 (N.D. 1975) (The state supreme court held that the 1968 amendments to Pub. L. 280 had preempted Section 27-19-05 of the state judicial code which had authorized individual Indians to confer, by consent, civil jurisdiction upon the state) (A4-a).

Petitioner has shown that, as a matter of federal law, Pub. L. 280 is no barrier to state court jurisdiction over an Indian's claim against a non-Indian based on a state-created cause of action. Further, tribal consent under state law has likewise been rendered irrelevant by the 1968 amendments to Pub. L. 280 as a condition for the extension of state jurisdiction under Pub. L. 280 to the reservations.

There has never been a federal jurisdictional principle, contrary to the assumption of the state court below, requiring Indian consent to state jurisdiction under Pub. L. 280 as a condition of his right to sue a non-Indian in state court on a state-created right of action. The state statute in question, when read in this light, that requires tribal consent to Pub. L. 280 jurisdiction as a condition of access to state courts, represents an indefensible condition on the exercise of a fundamental constitutional right. *See* Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Col. L. Rev. 321 (1935). Congressional

consent, under Pub. L. 280, to such a state statute was never given. *Kennerly v. District Court*, 400 U. S. 423, 425 (1971). Consequently, North Dakota cannot defend its statute as a derived exercise of federally delegated authority under Pub. L. 280. *Compare Washington v. Yakima Indian Nation*, 439 U. S. 463, 501 (Washington effectively accepted the jurisdiction under Pub. L. 280, and therefore, state legislation enacted under the express authority granted by Congress under that federal statute was immunized from the strict scrutiny on judicial review that otherwise might be applicable to such legislation.)

IV. Chapter 27-19 Of The North Dakota Judicial Code, As Construed By The State Supreme Court, Violates The Due Process And Equal Protection Clauses Of The Fourteenth Amendment

A. Introduction

Chapter 27-19 of the state judicial code bars the adjudication by state courts of cases involving Indian parties and arising on an Indian reservation in the state. The state supreme court concluded that the state legislative assembly intended to deprive the Indians of access to state court to adjudicate their claims unless those Indians consented under Chapter 27-19 to state jurisdiction over their reservations. Petitioner submits that this exclusion of a discrete, insular minority from state court by state legislative action violates the equal protection and due process clauses of the Fourteenth Amendment.[10]

---

[10]This Court has confirmed that the state citizen's right to sue in state courts, on the same terms as other persons under state law, is protected by the Fourteenth Amendment.

> . . . an individual cannot deprive a man of his right to vote, to hold property, to buy and to sell, *to sue in the courts*, . . .

(Continued on next page)

North Dakota, in common with other Western states, established a constitutional judicial administration that assured every man that the state courts were available to him for the redress of any injury he might suffer. N. D. Const. Art. I, § 22.[11] (A. 2a). Indians, along with other people, are entitled to seek judicial relief in state court. *Rolette County v. Eltobgi*, 221 N. W. 645 (1974). Nonetheless, the state supreme court has construed Chapter 27-19 as singling out cases, based in the constant factors of Indian identity and reservation origin, that cannot be heard by state courts. There are two reasons why this state legislative action is invalid under the Fourteenth Amendment: First, this statute deprives petitioner of liberty and property without the due process of law; and, second, this statutory classification is invalid under the equal protection clause of the Fourteenth Amendment.

The liberty to sue in state courts is one that has been acknowledged as so fundamental to the democratic process as to be worthy of protection under the due process clause of the Fourteenth Amendment.[12] Therefore, this

---

(Continued from previous page)

. . . [the] abrogation and denial of rights . . . for which the states alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied . . . (emphasis added). *The Civil Rights Cases*, 109 U.S. 3, at 11, 17-18 (1883).

[11]North Dakota, like other states, has a constitutional bill of rights guaranteeing, among other things, open courts. Deaby, *The Growth of American State Constitutions* (DeCapo Press: 1972), at 125.

[12]Congress, in debating the merits of the proposed Fourteenth Amendment to the Constitution, clearly contemplated that state-created rights, such as open and available courts for redress of injury, were to be secured to all the citizens of a state on the basis of equality.

(Continued on next page)

Court, from early on, has adopted a three-part test to determine if state legislation that seeks to curtail these rights is valid:

First, such legislation is assumed to be unconstitutional unless the state effectively rebuts that presumption;

Second, the state must show that the legislation advances a "compelling state interest"; and,

Third, the legislation must be narrowly drawn so as to represent the least restrictive alternative solution to the problem. *See generally, United States v. Carolene Products*, 304 U. S. 144, 152-153, n. 4 (1938).

B. The State Statute Clearly Conflicts With The Petitioner's Due Process Rights

---

(Continued from previous page)

The congressional debate on the resolution offered by Congressman Thadeus Stevens on December 4, 1865—that was later, as amended, to become the Fourteenth Amendment—focused on what rights were to be protected by this amendment. Representative Stevens, himself, viewed as fundamental the requirement that all laws—state and national—operate impartially and equally on all persons without regard to race or color. Consequently, the result was the inclusion in section one of the amendment of language prohibiting the states from abridging the rights accorded under law generally. Thus, Congressman Stevens described the intended reach of this section in these terms: "Whatever law protects the white man shall afford 'equal' protection to the black man. Whatever means of redress is afforded to one shall be afforded to all." The Debate, House of Rep., 39th Cong., 1st Sess. (May 8-10, 1866), *reprinted* at Schwartz, *Statutory History of the United States: Civil Rights*, Part 1, at 222-223.

Senator Howard Jacob, referring to the federal courts' interpretation of what rights are protected under the privileges and immunities clause of the Constitution, viewed *Corfield v. Coryell*, Case No. 3230, 4 Wash. 371 (C.C.E.D. Pa. 1823), as securing to the state citizens the right to sue in state courts on the same terms as other citizens. The Debate, Senate, 39th Cong., 1st Sess. (May 23-June 8, 1866), *reprinted* at Schwartz, Bernal, at 257-259.

The legislative history of Section 1 of the Fourteenth Amendment clearly secures the right to petitioner to sue in state courts on the same terms as everyone else under state law.

The state supreme court has construed Chapter 27-19 of the state judicial code as imposing a complete bar to the state district court's jurisdiction over Indian claims arising on-reservation. The court's application of that jurisdictional rule to the Tribe's claim against a non-Indian engineering firm means its claim, based on a state-created right and seeking a state-created remedy, has been terminated without any opportunity for a hearing on the merits.

As has been pointed out, the federally-approved constitution of the Tribe does not provide for jurisdiction over non-Indians, unless they consent to such jurisdiction. Even if a tribal court forum existed, any tribal judgment would have to be enforced through the state courts, and recent decisions of the state supreme court have cast serious doubts as to whether these tribal judgments would be accorded full faith and credit or comity by the state courts. *Lohnes v. Cloud,* 254 N. W. 2d 430 (N. D. 1977). There is no federal jurisdiction over this action in federal district court. *Schantz v. White Lightning,* 502 F. 2d 67 (8th Cir. 1974).

Therefore, the considerations presented by the facts of this case are similar to those that were at stake in this Court's decision in *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U. S. 673 (1930). There, the plaintiff sued to enjoin the county treasurer from collecting an allegedly discriminatory tax. The plaintiff had failed to present his claim that the tax, as applied to him, was discriminatory before the state tax commission. The Missouri Supreme Court affirmed the trial court's dismissal of the taxpayer's action without a hearing on the merits. This Court concluded that the practical effect of the Missouri court's judgment was to deprive the plaintiff of property

without affording him any opportunity to be heard in his defense. The court also found that the plaintiff had no alternative forum in which to present his claim. *Id.*, at 679.

This Court, on review, found that controlling issue to be one of procedural due process: "whether it (the plaintiff) had had an opportunity to present its case and be heard in its support." *Id.*, at 681. The Supreme Court then evaluated whether the plaintiff had been accorded any meaningful due process. The Court left no doubt on this issue:

> But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it. (citations omitted). *Id.*, at 682.

This Court has extended that rule to require a reasonable opportunity for a hearing before the state may deprive a person of a property right under its garnishment procedures. *Sniadich v. Family Finance Corporation,* 395 U. S. 337 (1969). This Court further extended this principle by holding that among the civil rights protected from discriminatory state action are the rights to acquire, enjoy, use, and dispose of property. *Lynch v. Household Finance Corporation,* 405 U. S. 538, 544 (1971). This Court, in *Lynch,* cites as support for constitutional protection of the property interest at stake in that case Section 1 of the 1866 Civil Rights Act that enumerates, among other basic civil liberties, the right "to make and enforce contracts, to sue" in court to enforce those contracted rights.

Lynch, 405 U. S. 538, 543. The property interest the petitioner seeks to enforce here is at least as vital and significant to the persons affected adversely by the state action as that complained of by the affected parties in *Lynch* and *Sniadich*. Without the ability to recover in contract actions many of petitioner's programs on which its people depend would be adversely affected. Thus, strict scrutiny of the state statute is justified under that standard declared by this Court when state legislation clearly affects rights protected by the Fourteenth Amendment. *United States v. Carolene Products*, 304 U. S. 144, 152-153, n. 4 (1938).

The state court here, in construing Chapter 27-19 of the state judicial code, has closed the doors of the courts without according petitioner any opportunity for a hearing. The state court deemed that state law to be authorized or required by federal law. However, based on the foregoing analysis, it is clear that the federal government has no policy or interest in precluding petitioner's action in state court. The state court has given no other reason for denying petitioner the due process of law secured to every other plaintiff by the force of the North Dakota Constitution and its statutes, as well as by the Fourteenth Amendment. This Court has recognized that claims for relief, such as petitioner's claim here, is a protected interest under due process. *Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 428 (1982).

Therefore, petitioner submits that the state court's decision below, denying it and all other Indian plaintiffs an opportunity to be heard on any claim arising on-reservation, is clearly violative of due process.

C. The Appropriate Standard Of Judicial Review Of This State Legislations Is Strict Scrutiny

State legislative classifications that single out for discriminatory treatment, discrete and insular minorities, such as Indians, are subject to a more severe and searching standard of judicial review than is otherwise the case. *Loving v. Virginia,* 388 U. S. 1. (1967). Petitioner is barred from state court here solely because the state legislature has enacted a state statute, Chapter 27-19, of the Century Code, barring suits by Indians unless they consent under state law to state jurisdiction on-reservation. The legislation singles out, on its face, Indians as the exclusive category to be affected by this legislation.[13]

The petitioner has already shown that the framers of Section 1 of the Fourteenth Amendment intended to protect the right to sue in state court on equal terms. The state supreme court clearly regarded the state statute in question requiring the court dismissals of Indian claims arising on-reservation as the exclusive basis for denying Indians access to state courts. Thus, this Court's require-

---

[13]Petitioner does not contend that Indians constitute a distinct racial classification. *Morton v. Mancari,* 417 U.S. 535 (1974). However, this Court has recognized that certain minorities, while not racially distinct, may in the nation's experience suffer from such prejudice and hostile treatment at the hands of state legislatures that this Court shall protect such "classes or castes" under the Fourteenth Amendment. *Plyer v. Doe,* 457 U.S. 202, 217, n. 14 (1982) (This Court voted 5-4 that a Texas statute which withholds from local school districts any state funds for the education of children who were not "legally admitted" into the United States and which authorizes local school districts to deny enrollment to such children, violates the Equal Protection Clause of the Constitution.)

(Continued on next page)

ment that the state legislative infringement on a right be direct and not peripheral is met here. *United States v. O'Brien*, 391 U. S. 367, 385 (1968).

Strict scrutiny of state discriminatory legislation means that, on review, this Court engages in no presumption as to the validity of the legislation in question. On the contrary, the state is required to demonstrate that its classification serves a compelling state governmental interest. *Plyer v. Doe*, 457 U. S. 202, 217 (1982).

Here, the state supreme court, far from identifying any state interest that is served by the state statute in question, explained that it was required or authorized by federal law. Consequently, in rejecting petitioner's equal protection challenge to the statute, the state court asserted that the law was immune from such attack under federal law:

> [t]he people of North Dakota and the legislature were acting under explicit authority granted by Congress in the exercise of its federal power over Indians when our Constitution was amended and Chapter 27-19, N.D.C.C., was enacted. We therefore find no equal protection violation of the Constitution of either the state or the United States and for the reasons stated on our opinion, affirm the judgment of the district court. 321 N. W. 2d 510, 513 (1982).

Petitioner has shown that Congress neither prohibited state jurisdiction over claims like petitioner's by enacting Pub. L. 280 nor consented to the state law, Chapter 27-19,

(Continued from previous page)

This Court has recognized that Indians, as a discreet and powerless minority, may be vulnerable to the effects of hostile state legislation. *United States v. Kagama*, 118 U.S. 375, 384-385 (1886).

depriving petitioner and other Indians of access to state court. The state statute must stand on its merits as being a necessary legislative measure to meet some compelling state need. The state law has absolutely nothing to do with the federal purpose or policy, explicit or implicit, behind Pub. L. 280.

Regardless of whether a state borrows federal law to act as a guide for its own policy, the Court wrote:

> [that] to justify its use as a criterion for its own discriminatory policy, the state must demonstrate that the classification is reasonably adapted to 'the purposes for which the state desires to use it.' (citations omitted) *Plyer v. Doe*, 457 U. S. 202, 226 (1982).

The state supreme court has repeatedly disclaimed any independent state legislative interest in barring Indian suits in state court. *Rolette County v. Eltobgi*, 221 N. W. 2d 645, 648 (1974). Thus, the state advances no interest at all, compelling or otherwise, as the basis for sustaining such legislation. There is simply no good reason or state interest ground for depriving petitioner of access to state court. Federal law, in any case, prevents Indians from consenting to state jurisdiction under state laws such as Chapter 27-19. *Kennerly v. District Court*, 400 U. S. 423, 427 (1971). Indians could not comply with this state statute even if they wished.

D. The State Law In Question Does Not Represent The Least Restrictive Solution To Any Jurisdictional Concerns The State May Have

The state legislative classification here, even assuming that the legislative purpose in enacting the statute

was an attempt at resolving some jurisdictional concerns the state legislature had, represents an arbitrary means to achieve thta legislative goal. Linde, *Due Process of Law Making*, 55 Neb. L. Rev. 197 (1976). The power to regulate jurisdiction is the power to regulate rights. This Court has never allowed state legislatures to completely cut off access to state courts, otherwise afforded to a distinct group by the Constitution, as a legitimate means to solve the perceived regulatory concerns of a state legislature.

This Court has pointed out to state legislatures that a clear, legitimate procedure exists for the solution of regulatory problems that state legislatures may see arising from the presence of reservations within their state borders. *Kennerly v. District Court*, 400 U. S. 423 (1971) (Pub. L. 280, as amended by the provisions of 25 U. S. C. §§ 1321-1326, sets forth the manner in which state legislatures and tribal governments may resolve any jurisdictional issues).

This state legislation, as construed by the state supreme court, indiscriminately bars all Indian claims regardless of whether any legitimate federal Indian law or federal jurisdictional issues are presented by the facts of the case. Petitioner submits that the discriminatory legislative action is just unrelated to any legitimate goal.

CONCLUSION

For the reasons set forth above, petitioner respectfully requests that the judgment of the Supreme Court of North Dakota be reversed.

Respectfully submitted,

17 Second Avenue West
Dickinson, ND 58601
(701) 225-6066

JOHN O. HOLM
Counsel for the Three Affiliated Tribes

Legal Department
Three Affiliated Tribes
P.O. Box 460
New Town, ND 58763
(701) 627-3621

CHRISTOPHER D. QUALE
RAYMOND CROSS
Counsel for the Three Affiliated Tribes

APPENDIX

N. D. Enabling Act:

The relevant portion of Section 4 of North Dakota's Enabling Act, 25 Stat. 677, incorporated in N. D. CONST. Art. XVI, § 203, reads:

> The people of North Dakota agree and declare that they forever disclaim all right and title to . . . all lands . . . owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . .

N.D. CONST. ART. I

Section 22. All courts shall be open, and every man for any injury done him in his lands, goods, person, or reputation shall have remedy by due process of law, and right and justice administered without sale, denial or delay. Suits may be brought against the state in such manner, in such courts, and in such cases, as the legislative assembly may, by law, direct.

N.D. CONST. ART. XVI, § 203, Amended and renumbered as ART. XIII, § 1 (2) reads in relevant part:

Section 1(2). The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the

United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, provided, however, that the Legislative Assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by act of Congress.

. . .

N.D. CENTURY CODE (1974)

27-19-01. *Assumption of jurisdiction.*—In accordance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution, jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this chapter. Upon acceptance the jurisdiction of the state shall be to the same extent that the state has jurisdiction over other civil causes of action, and those civil laws of this state that are of general application to private property shall have the same force and effect within such Indian reservation or Indian country as they have elsewhere within this state.

27-19-02. *Method of acceptance.*—Acceptance of Jurisdiction may be by either of the following methods:

(1) Upon petition of a majority of the enrolled residents of a reservation who are eighteen years of age or older; or

(2) The affirmative vote of the majority of the enrolled residents voting who are eighteen years of ge or older, at an election called and supervised by the North Dakota Indian Affairs Commission

upon petition of fifteen percent of those eligible to vote at such an election.

27-19-05. *Individual acceptance.* — An individual Indian may accept state jurisdiction as to himself and his property by executing a statement consenting to and declaring himself and his property to be subject to state civil jurisdiction as herein provided. Such jurisdiction shall become effective on the date of execution of such statement. The statement accepting state jurisdiction shall be filed in the office of the county auditor of the county in which the person resides and when so filed shall be conclusive evidence of acceptance of state civil jurisdiction as provided herein.

SECTIONS 6 AND 7 OF PUBLIC LAW 280, 67 STAT. 589

Section 6: Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, that the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Section 7: The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, provided for in this Act, to assume jurisdiction at such time and in such manner as the people

of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

SECTION 402(a) OF PUBLIC LAW 90-284, 82 STAT. 79, CODIFIED AT 25 U.S.C. § 1322

§ 1322. Assumption by State of civil jurisdiction

(a) *Consent of United States;* force and effect of civil laws. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State.

SECTION 404 OF PUBLIC LAW 90-284, 82 STAT. 79, CODIFIED AT 25 U.S.C. § 1324

§ 1324. Amendment of State constitutions or statutes to remove legal impediment; effective date

Notwithstanding the provisions of any enabling act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or exist-

ing statutes, as the case may be, to remove any legal impediment to the assumption of civil or criminal jurisdiction in accordance with the provisions of this title (25 USCS §§ 1321 et seq.). The provisions of this title (25 USCS §§ 1321 et seq.) shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes, as the case may be.

SECTION 406 OF PUBLIC LAW 90-284, 82 STAT. 79, CODIFIED AT 25 U.S.C. § 1326

§ 1326. Special election

State jurisdiction acquired pursuant to this title (25 USCS §§ 1321 et seq.) with respect to criminal offenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special electon held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 percentum of such enrolled adults.

Supreme Court, U.S.
FILED
AUG 30 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-629

In the Supreme Court of the United States

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., A NORTH DAKOTA PROFESSIONAL CORPORATION,
Respondent,

vs.

SCHMIDT, SMITH & RUSH,
Respondent.

BRIEF OF RESPONDENT, WOLD ENGINEERING

HUGH MCCUTCHEON
(Counsel of Record)
BOSARD, MCCUTCHEON & RAU, LTD.
200 Heritage Place
P.O. Box 939
Minot, North Dakota 58702-0939
(701) 852-3578
Attorney for Respondent Wold Engineering

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

I. QUESTION PRESENTED FOR REVIEW

Whether the North Dakota State District Courts have subject matter jurisdiction to hear a civil action arising within the exterior boundaries of an Indian Reservation, and involving Indian litigants, where the Indian tribe within that reservation has failed to consent to the assumption of civil subject matter jurisdiction by the State courts.

II. PARTIES TO THE PROCEEDING

The parties to this proceeding are:

Three Affiliated Tribes of the Fort Berthold Reservation, Petitioner.

Wold Engineering, P.C., a North Dakota Professional Corporation, Respondent.

Schmidt, Smith & Rush, Respondent.

The United States of America, Amicus Curiae supporting the Petitioner.

Turtle Mountain Band of Chippewa Indians as Amicus Curiae supporting the Petitioner.

Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes of the Fort Peck Reservation, and Shoshone Tribe of the Wind River Reservation as Amici Curiae supporting the Petitioner.

III. TABLE OF CONTENTS AND AUTHORITY

A. Contents

I. Question Presented for Review I
II. Parties to the Proceeding II
III. Table of Contents and Authority III
A. Contents III
B. Authority IV
1. Federal Case Law IV
2. Federal Statutory Law & Rules VI
3. State Case Law VI
4. State Statutory Law & Rules VI
5. Miscellaneous Authority VII
IV. Opinions and Judgments Delivered in the Courts Below 1
V. Jurisdictional Statement 1
VI. Constitutional Provisions & Statutes 1
A. United States Constitutional Provisions 1
B. Federal Statutes 2
C. State Constitutional Provisions & Statutes 3
VII. Statement of the Case 6
VIII. Summary of the Argument 8
IX. Argument 12
A. The proper analysis to be employed by a court requires inquiry into whether Congress intended to preempt State Court jurisdiction over civil causes of action arising on a reservation and involving Indian litigants 12

1. Historical traditions of State sovereignty reveal the State and its courts have no subject matter jurisdiction over Indians in Indian country 14

2. Historical traditions of Indian sovereignty reveal Indians have been immune from State Court jurisdiction, and that Indians have not had access to State courts for redress of wrongs occurring on the reservation 18

3. Public Law 280 as enacted and amended must be considered in front of the backdrop of history and tradition 24

B. The decision of the North Dakota Supreme Court does not deny equal protection of the laws to Indian litigants 35

X. Conclusion 43

Appendix 45

B. Authority

1. Federal Case Law

Boddie v. Connecticut, 401 U.S. 371 (1971) 37, 41

Bryan v. Itasca County, 426 U.S. 373 (1976) 24, 43

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102 (1980) 33

Dickerson v. New Banner Institute, Inc., ... U.S. ....., 75 L Ed 2d 845 (1983) 33

Felix v. Patrick, 145 U.S. 317 (1892) 20, 21, 22, 23, 43

Fisher v. District Court, 424 U.S. 382 (1976) 17, 35

Kennerly v. District Court of Montana, 400 U.S. 423 (1971) 16, 20, 24, 31, 32

Lane v. Santa Rosa, 249 U.S. 110 (1919) 22
Lonewolf v. Hitchcock, 187 U.S. 553 (1903) 12
McClanahan v. Arizona State Tax Commissioner, 411 U.S. 164 (1973) 13, 15, 23, 31, 32
Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973) 20, 43
Morton v. Mancari, 417 U.S. 535 (1974) 35, 40
New Mexico v. Mescalero Apache Tribe, ... U.S. ....., 51 LW 4741 (1983) (Opinion, 82-331) 16, 17, 20, 23
Plyler v. Doe, 457 U.S. 202 (1982) 38, 39
Rice v. Olson, 324 U.S. 786 (1945) 14
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 31
Three Affiliated Tribes v. Wold Engineering, et al., ... U.S. ....., 74 L Ed 2d 598 (1982) .. 7
Three Affiliated Tribes v. Wold Engineering, ... U.S. ....., 76 L Ed 2d 805 (1983) 1
United States v. Antelope, 430 U.S. 641 (1977) 42
United States v. Bevans, 16 U.S. (3 Wheat.) 337 (1818) 13
United States v. Candelaria, 271 U.S. 432 (1926) 20, 21, 22, 23, 43
United States v. Kagama, 118 U.S. 375 (1886) 19
United States v. McBratney, 104 U.S. 621 (1881) 19
United States v. Tarble, 80 U.S. (13 Wall.) 397 (1872) 14
Washington v. Confederated Tribes, 447 U.S. 134 (1980) 12-13, 43
Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) 26, 27, 28, 34, 35, 36
White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980) 19

Williams v. Lee, 358 U.S. 217 (1959) 15, 19, 21, 30, 33

Worcester v. Georgia, 41 U.S. (6 Pet.) 515 (1832) 14, 19, 21, 39

2. Federal Statutory Law & Rules

United States Constitution, Article I, §8, Clause 3 .....1, 14, 39

United States Constitution, Amendment 14, §1 2

25 U.S.C. §1322(a) 2, 16, 18, 24, 31, 33

25 U.S.C. §1326 .....2, 24, 31, 32

Enabling Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676 .....3, 14

Public Law 280, Chapter 505 U.S. Statutes at Large 67 .....*passim*

3. State Case Law

Gourneau v. Smith, 207 N.W.2d 256 (N.D. 1973) 30

In re Whiteshield, 124 N.W.2d 694 (N.D. 1963) 25, 27

Three Affiliated Tribes v. Wold Engineering, et al., 321 N.W.2d 510 (N.D. 1982) 1

Nelson v. Dubois, 232 N.W.2d 54 (1975) 30

Vermillion v. Spotted Elk, 85 N.W.2d 432 (N.D. 1957) 29, 30

White Eagle v. Dorgan, 209 N.W.2d 621 (N.D. 1973) 17

4. State Statutory Law & Rules

North Dakota Constitution, Article 16, §203 (Constitution of 1889) 3, 14, 25

Chapter 27-19, NDCC 5, 16, 25, 36

5. Miscellaneous Authority

Goldberg, Carol E., *P.L. 280: The Limits of State Jurisdiction Over Reservation Indians*, 22 UCLA L.Rev. 535 (1975) 25

L.Tribe, *American Constitutional Law* (1978) §16-14 12

IV. OPINIONS AND JUDGMENTS DELIVERED IN COURTS BELOW

The Opinion and Judgment of Dismissal without Prejudice from the North Dakota District Court, Northwest Judicial District, in Ward County, Civil No. 46392, The Honorable Wallace D. Berning presiding, is an unreported decision. (The Memorandum Opinion of North Dakota District Court is reprinted in full in the Joint Appendix of the parties. Joint Appendix, 18-20. Judgment of Dismissal Without Prejudice, Pet., App. 1a.)

The Judgment of the North Dakota Supreme Court, written by Chief Justice Ralph Erickstad, affirming the decision of the North Dakota District Court is reported. *Three Affiliated Tribes v. Wold Engineering, et al.*, 321 N.W.2d 510 (N.D. 1982). (The opinion of this Court is reprinted in full in the Appendix of the Brief of Petitioner for Writ of Certiorari, Pet., App. 3a-10a.)

V. JURISDICTIONAL STATEMENT

This case appears before this Court pursuant to a grant of Writ of Certiorari issued by this Court on April 25, 1983. *Three Affiliated Tribes, Petitioner v. Wold Engineering, Respondent,* ..... U.S. ....., 76 L Ed 2d 805 (1983).

VI. CONSTITUTIONAL PROVISIONS AND STATUTES

A. United States Constitutional Provisions:

Article I, Section 8, Clause 3.

"The Congress shall have power: . . . To regulate commerce with foreign nations, and among the several states, and with the Indian tribes."

Amendment 14, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

B. Federal Statutes:

25 U.S.C. Section 1322(a).

"(a) Consent of United States—Force and effect of civil laws. The consent of the United States is hereby given to any State not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof which would be affected by such assumption, such measure of jurisdiction over any or all such civil causes of action arising within such Indian country or any part thereof as may be determined by such State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country or part thereof as they have elsewhere within that State."

25 U.S.C. Section 1326.

"State jurisdiction acquired pursuant to this title [25 USCS §§1321-1326] with respect to criminal of-

fenses or civil causes of action, or with respect to both, shall be applicable in Indian country only where the enrolled Indians within the affected area of such Indian country accept such jurisdiction by a majority vote of the adult Indians voting at a special election held for that purpose. The Secretary of the Interior shall call such special election under such rules and regulations as he may prescribe, when requested to do so by the tribal council or other governing body, or by 20 per centum of such enrolled adults."

Enabling Act of February 22, 1889, Chapter 180, 25 Statutes at Large 676, Section 4, Clause 2. (Reprinted in relevant part in Appendix attached hereto.)

Public Law 280, Chapter 505 U.S. Statutes at Large 67. (Reprinted in full in Appendix attached hereto.)

C. State Constitutional Provisions & Statutes:

Article 16, §203 (Original Constitution of the State of North Dakota, 1889.)

COMPACT WITH THE UNITED STATES

"The following article shall be irrevocable without the consent of the United States and the people of this state:

Section 203. First . . .

Second. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United

States, and that said Indian lands shall remain under the absolute jurisdiction and control of the congress of the United States; that the lands belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by this state on lands or property therein, belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing in this article shall preclude this state from taxing as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person, a title thereto, by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any acts of congress containing a provision exempting the lands thus granted from taxation, which last mentioned lands shall be exempt from taxation so long, and to such an extent, as is, or may be provided in the act of congress granting the same."

Article 16, §203 as amended in 1959. (Now renumbered in North Dakota Constitution as Article 13, §1, Clause 2.)

COMPACT WITH THE UNITED STATES

"The following article shall be irrevocable without the consent of the United States and the people of this state:

Section 1.

2. The people inhabiting this state do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the

boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes, and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and that said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States, provided, however, that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress; that the lands belonging to citizens of the United States residing without this state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by this state on lands or property therein, belonging to, or which may hereafter be purchased by the United States or reserved for its use. But nothing in this article shall preclude this state from taxing as other lands are taxed, any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person, a title thereto, by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any Acts of Congress containing a provision exempting the lands thus granted from taxation, which last mentioned lands shall be exempt from taxation so long, and to such an extent, as is, or may be provided in the Act of Congress granting the same."

Chapter 27-19, NDCC, Indian Civil Jurisdiction. (Reprinted in full in Appendix attached to Respondent's Brief in Opposition to Petition for Writ of Certiorari pages 19-22.)

VII. STATEMENT OF THE CASE

Petitioner, an Indian tribe, hereafter referred to as Three Tribes, contracted with Respondent, a North Dakota Professional Corporation, hereafter referred to as Wold Engineering, for purposes of designing a water intake system for the Four Bears Village. (Complaint, Joint Appendix, pp. 1-3.) Work on the project occurred entirely within the exterior boundaries of the Fort Berthold Indian Reservation. (Memorandum Opinion of the District Court, Joint Appendix, p. 18.)

Three Tribes conceded that its enrolled tribal members have not voted to consent to the assumption of civil jurisdiction by the state courts of North Dakota. (Memorandum Opinion of the District Court, Joint Appendix, p. 18.)

After the water intake system was completed, Three Tribes initiated a lawsuit in the North Dakota District Court. This lawsuit alleged Wold Engineering had negligently designed and constructed the intake system. (Complaint, Joint Appendix, pp. 1-3.)

Wold Engineering submitted its Answer and asserted a Counterclaim alleging Three Tribes had not paid in full the contract price of the project. (Answer & Counterclaim, Joint Appendix, pp. 4-7.) Wold Engineering then moved to dismiss the action for lack of subject matter jurisdiction.

The Honorable Wallace D. Berning, District Judge, accepted briefs from all parties, and after due consideration dismissed the case for lack of subject matter jurisdiction. (Judgment of Dismissal, Petition for Certiorari, p. 1a.) Judge Berning, however, recognizing the significance of the state and federal statutes concerning state assumption

of subject matter jurisdiction on Indian reservations dismissed the action without prejudice. He provided further that Three Tribes would be free to re-institute its action should the tribal members vote to accept state court jurisdiction. (Judgment of Dismissal, Petition for Certiorari, p. 1a.)

Three Tribes appealed the decision of the District Court to the North Dakota Supreme Court. That Court affirmed the decision of the District Court holding that the North Dakota legislature, pursuant to Public Law 280, disclaimed completely all jurisdiction in Indian country unless the Indians themselves vote to accept state jurisdiction. Three Tribes has not voted to accept such jurisdiction. (Decision of the North Dakota Supreme Court, Petition for Certiorari, pp. 3a-10a.)

Three Tribes made its Petition for Writ of Certiorari to this Court. (Petition for Writ of Certiorari.) The Solicitor General was invited to express the views of the United States on this issue. *Three Affiliated Tribes v. Wold Engineering, et al.*, ... U.S. ....., 74 L Ed 2d 598 (1982). The Solicitor General submitted his Brief in Support of Three Tribes. (Amicus Brief of the United States.)

This Court granted certiorari on April 25, 1983, and the case now appears before this Court for decision.

VIII. SUMMARY OF THE ARGUMENT

The State of North Dakota has, consistent with federal law and policy, conditioned access of Indian litigants to the state courts upon compliance with federal laws. These federal laws preempt state court subject matter jurisdiction and only by strict state and tribal compliance with these laws can state courts be open for such suits.

The decision of the North Dakota Court will withstand the scrutiny of this Court's preemption analysis. The first step in that analysis is to look to traditional concepts of state and tribal sovereignty, and the limitations history has placed on that sovereignty. The state's sovereign jurisdiction is coextensive with its territory, and with the power possessed by its legislature to make laws. Initially, Indian nations were completely sovereign and the laws passed by the various states could have no effect in Indian country. This policy of leaving Indians free from state jurisdiction and control is deeply rooted in our nation's history.

As Indians came in closer daily contact with the non-Indian world the totality of Indian sovereignty within Indian country diminished. Indians became subject to the plenary authority of Congress, lost jurisdiction over many activities involving non-Indians in Indian country, and, to a quite limited extent, became subject to state regulatory laws of a general nature. This erosion of sovereignty has had little effect however on activities which involve the Indians themselves. They remain, in their own affairs on their reservations, and except in instances where Congress has spoken otherwise, or in other exceptional circumstances, free from state controls and jurisdiction.

Once off the reservation, Indians, as citizens of the various states of the United States, are free to seek redress

in any state's courts for situations arising off of the reservation. This right of access to state courts for such purposes has been misinterpreted. Courts in other jurisdictions have allowed Indians to maintain suits in their state courts for actions which arose in Indian country in spite of federal policy and enactments which clearly indicate such suits are inappropriate. That these erroneous decisions from other jurisdictions may now state the rule of law in those states should in no way affect the decision of the North Dakota Court.

There is no tradition or history which would allow a state to assert its jurisdiction over a lawsuit arising in Indian country, and involving Indian litigants.

In the second step of the preemption analysis, the panorama of history and tradition is used as a backdrop in which to examine the particular federal enactment in issue. In that light, when Congress, which has plenary authority over Indian tribes, speaks to a subject such Congressional directive controls the issue completely. States, Indian tribes, courts, and executive officers must comply with that Congressional directive. This analysis turns on one point—that is, when Congress spoke to the subject it either intended to prohibit State jurisdiction in Indian country, or it did not. No further inquiry into the balancing of interests, or the conflicts presented by the Congressional directive need be made

Public Law 280, hereafter P.L. 280, allowed states which had not previously been granted subject matter jurisdiction in Indian country to unilaterally assume that jurisdiction. P.L. 280 contained procedural and substantive requirements the states were required to follow prior to assumption. North Dakota followed these requirements. Absent strict compliance with these federal requirements, state court jurisdiction is preempted.

North Dakota, while following P.L. 280 requirements, added a state provision requiring Indian consent to any assumption of state jurisdiction. This provision foreshadowed present federal law, and was added in response to Indian opposition to unilateral state action.

P.L. 280 was amended by the Indian Civil Rights Act of 1968. As does the North Dakota law, the amendment contains provisions which require Indian consent to any state assumption of subject matter jurisdiction. In reviewing P.L. 280 and the Indian Civil Rights Act, the plain meaning must be given to the terms of the statutes. Further, these terms must be given their due consideration for the terms used were not an idle choice. The courts of North Dakota have attempted to give meaning to the express terms of these statutes, and to fully implement all terms. In so doing, the courts of North Dakota have conditioned the access of Indian tribes to state court upon strict state and tribal compliance with all state and federal procedural and substantive requirements. It is a position which has been consistently insisted upon by the state courts, and which has been known to the Indian tribes for 20 years.

The actions of Congress were based upon political and not racial considerations. These actions carefully consider all state, federal, and tribal interests. This Court need not inquire into these interests, and can presume Congress struck the appropriate balance. This Congressional balancing does not deny any constitutionally guaranteed rights to the Indian tribes.

When a state acts pursuant to a nondiscriminatory federal Indian law, the state action is constitutional and will pass scrutiny. That Indians sometimes have different standing under state law passed pursuant to a federal statute is to be expected. This different standing flows from

the recognized powers of self determination preserved for the Indians under the Indian Civil Rights Act. This different standing may cause an occasional denial of a forum to an Indian litigant. Such a denial however does not constitute a denial of equal protection.

Two conclusions have emerged from Indian cases in which preemption analysis has been applied. First, where traditional notions of sovereignty do not recognize a right existing in favor of the Indian tribes, this Court will only recognize such right if it is conferred by Congress. There is no precedent which will allow an Indian tribe to sue a non-Indian in state court for actions arising within Indian country. Congress has stated the conditions upon which this right should arise. This Court should enforce those conditions until they are changed by Congress.

Second, ambiguous statutes will not abolish Indian immunities or rights. The statutes at issue here, if ambiguous, do not abolish any immunity or right, for none existed in the first instance.

The decision of the North Dakota Supreme Court emerges from all analysis as being in support of the two conclusions which can be drawn. The actions by the North Dakota Court are consistent with federal law and policy, and do not deny any Indian litigants rights or immunities. Congress, in the exercise of its power, spoke to the subject and preempted all other action. The North Dakota courts have merely followed this federal directive and have conditioned access to state courts until such time as the Indians themselves comply with the applicable federal and State law.

The decision of the North Dakota Supreme Court is consistent with federal law and policy and therefore ought be affirmed.

IX. ARGUMENT

A. The Proper Analysis To Be Employed By A Court Requires Inquiry Into Whether Congress Intended To Preempt State Court Jurisdiction Over Civil Causes Of Action Arising On A Reservation And Involving Indian Litigants.

Indian tribes are subject to the plenary authority of Congress. *Lonewolf v. Hitchcock*, 187 U.S. 553 (1903). So long as it does not act in racially discriminatory manner, Congress's authority over the Indian tribes is virtually unfettered. When Congress speaks to an issue involving Indian tribes, this act of Congress binds the states, the Indian tribes, and even this Court. All must follow the clear mandates of Congress. L.Tribe, *American Constitutional Law* (1978) §16-14.

The plenary power of Congress creates the foundation for analysis of all Indian issues. State authority in Indian country is dependent upon Congress, and therefore, in this case, the question to be answered is simply put: Either Congress intended to preempt state authority, or it did not. Further inquiry into fairness, or balancing of interests is "not the appropriate gauge for determining validity since it is that very balancing which [has been] reserved to Congress." *Washington v. Confederated Tribes*, 447 U.S. 134, 177 (1980) (Rehnquist, J., concurring and dissenting). In the case at bar, Congress has spoken to the issue of state civil jurisdiction on Indian reservations in North Dakota. The people of North Dakota by constitutional amendment, the State Legislature, and the North Dakota Courts have followed these Congressional mandates.

Justice Rehnquist, in his concurring and dissenting opinion in *Washington v. Confederated Tribes*, 447 U.S. 134,

176 (1980), outlines a careful analysis to be applied to questions concerning state jurisdiction in Indian country. This analysis first recognizes, by implication, the plenary authority of Congress over Indian matters. With this in mind, inquiry is made into the historical traditions and notions of state and tribal sovereignty. Justice Rehnquist then cites *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164, at 172 (1973), asserting these traditions and notions serve as a backdrop against which applicable federal law should be read.

A careful review of history will reveal that traditionally, in matters involving tribal members, the states have no jurisdiction on an Indian reservation absent an express grant from Congress, or on demonstrated exceptional circumstances. Further, Indians have not had access to state courts for redress of wrongs occurring on their reservations.

The second inquiry involves examination of the federal laws in question. In this case, the plain meaning of those laws explicitly cuts off all state jurisdiction in any case where Indians are litigants unless certain procedural steps are taken.

After making this two step review, the analysis will point to the conclusion that the decision of the North Dakota Court was correct.

1. Historical Traditions Of State Sovereignty Reveal The State And Its Courts Have No Subject Matter Jurisdiction Over Indians In Indian Country.

The sphere of jurisdiction a state possesses is coextensive with its territory, and with its legislative power. *United States v. Bevans*, 16 U.S. (3 Wheat.) 337 (1818). Thus, where the state's territory ends, or in subject matter areas where its legislature is denied a voice, the state does

not have jurisdiction. Historically, the federal government, through Congress and by virtue of the United States Constitution (U.S. Constitution, Article I, §8, Clause 3) was possessed of all power over Indians and Indian country. This total control over Indians and Indian country appropriated a sphere of action to the United States, and within any such appropriated sphere of action, the processes of the state and its courts may not reach. *United States v. Tarble,* 80 U.S. (13 Wall.) 397 (1872).

The cornerstone of federal, state and tribal relations was laid in the case of *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832). In that case, the Indian tribes were recognized as distinct sovereign communities. They were not thought of as states or foreign nations, but were considered capable of governing their own internal affairs subject to control of the United States Government. The case placed absolute limits on the states and decreed that the laws of a state can have no effect in Indian country.

Worcester enunciated a basic United States policy. While that policy has undergone extensive modification, the policy remains. Leaving Indians free from state jurisdiction and control is deeply rooted in our nation's history. *Rice v. Olson,* 324 U.S. 786 (1945).

The national policy was originally embodied in North Dakota in the Enabling Act which brought this State into the Union, and in the State's original constitutional disclaimer over actions arising in Indian country. Both required that the State forever disclaim any jurisdiction over actions involving Indians and Indian country. Enabling Act of February 22, 1889, Ch. 180, 25 Statutes at Large 676; North Dakota Constitution, Article 16, §203 (Constitution of 1889). (See pages 63-76, and 266, Replacement Volume 13, NDCC.)

As stated above, this national policy has not remained static. The traditional sphere of jurisdiction forbidden to the states arose from a time when national policy was also geared to isolation of the Indian culture from the non-Indian world. This policy of isolation has given way. The policy now:

> ". . . follow(s) a policy calculated eventually to make all Indians full-fledged participants in American society. This policy contemplates criminal and civil jurisdiction over Indians by any State ready to assume the burdens that go with it as soon as the educational and economic status of the Indians permits the change without economic disadvantage to them. See HR Rep No. 848, 83d Cong., 1st Sess. 3, 6, 7 (1953). Significantly, when Congress has wished the States to exercise this power it has *expressly granted them the jurisdiction* which *Worcester v. Georgia* had denied." (Emphasis supplied) *Williams v. Lee*, 358 U.S. 217, at 220, 221 (1959).

This Court has further cited to what it referred to as a leading text on Indian problems which summarized the relevant law as follows:

> "State laws generally are not applicable to tribal Indians on an Indian reservation except where *Congress has expressly provided that state laws shall apply*. U.S. Department of Interior, Federal Indian Law 845 (1958)." (Emphasis supplied) *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164, at 170, 171 (1973).

Thus, while jurisdiction over actions arising in Indian country initially was a sphere appropriated by the federal government, Congress has carved exceptions to this sphere by *expressly conferring subject matter jurisdiction to the*

states. Absent this express grant of jurisdiction, there is no state jurisdiction in state court for actions arising in Indian country.

The carved exception in this case is found in P.L. 280, and 25 U.S.C. §1322(a). This express grant of jurisdiction given by Congress requires specific tribal and state actions. Failure to fully comply with these express mandates by either the state or tribe has been held to be fatal to any state court assumption of jurisdiction. *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971). North Dakota has acted in accordance with the traditions and policies of the federal government and has taken only that jurisdiction which has been expressly granted to it by Congress. Chapter 27-19, NDCC. Any jurisdiction outside of this express grant may not be assumed by North Dakota, and any exercise of jurisdiction outside of that grant is a void act. Three Tribes insists the State's courts exercise this void jurisdiction.

This Court recognizes another exception to the policy of the absence of state court jurisdiction in Indian country. In a recent discussion of the problems faced by drawing lines of demarcation between the respective spheres of state and tribal authority over Indian reservations, this Court noted that Indians have retained sovereignty over their territory, and that state jurisdiction over Indian country remains preempted by federal law unless the state interests at stake are sufficient to justify the assertion of state authority. *New Mexico v. Mescalero Apache Tribe,* ..... U.S. ....., 51 LW 4741 (1983) (Opinion, 82-331). This Court noted in that case:

> "For instance, we have held that Indian tribes have been implicitly divested of their sovereignty in certain respects by virtue of their dependent status, and that under certain circumstances a State may validly as-

sert authority over activities of nonmembers on a reservation, and that *in exceptional circumstances* a State may assert jurisdiction over the onreservation activities of tribal members." (Emphasis supplied) *New Mexico v. Mescalero Apache Tribe,* ..... U.S. ....., at ....., 51 LW 4741 at 4743 (1983) (Opinion, 82-331).

Thus, it may be possible for a state to assert its authority in Indian country if sufficient state interests are at stake, or in cases involving Indians where there exists "exceptional circumstances" to justify state jurisdiction.

In the case at bar there has been no showing of any state interests at stake sufficient to justify the state court's intrusion into the Indian domain. After reviewing this Court's decisions in Indian matters, it would appear the only area where there exists such state interests at stake are tax cases. North Dakota has recognized these essential state interests and will hear these tax cases when brought by Indian plaintiffs. *White Eagle v. Dorgan,* 209 N.W.2d 621 (N.D. 1973).

Three Tribes and the Solicitor General argue that there exists "exceptional circumstances" here since the State Court decision has denied Indians a forum for dispute resolution. This problem is not exceptional, and this Court has held that such a denial caused by a jurisdictional holding is to be expected, and is justifiable:

". . . even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, such disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." *Fisher v. District Court,* 424 U.S. 382 at 390-391 (1976).

Tradition and history, as embodied in the federal Indian policy, have kept Indians and Indian country apart from the territorial limits of the State, and out of the grasp of State legislative powers. Having neither the territory, nor the legislative power, states historically and traditionally lack all jurisdiction in Indian country. The decision of the North Dakota Court is consistent with this tradition.

The decision of the North Dakota Court will also withstand scrutiny in those rare instances where the traditional and historical limits on state power have been altered. There is present in the case at bar an express Congressional grant of jurisdiction to the states provided certain state and tribal actions are taken. P.L. 280, and 25 U.S.C. §1322(a). Three Tribes has failed to comply with this Congressionally mandated action and, while there are instances where a state's interests justify intrusion, or there exists exceptional circumstances to justify state intrusion, Three Tribes cannot point to any such interests or circumstances which would justify perverting the traditional notions of history in this case.

The decision of the North Dakota Court is correct in light of history.

2. Historical Traditions Of Indian Sovereignty Reveal Indians Have Been Immune From State Court Jurisdiction And That Indians Have Not Had Access To State Courts For Redress Of Wrongs Occurring On The Reservations.

Prior to colonization of this hemisphere by the European powers, Indian tribes were sovereign unto themselves and exercised all powers of self government. With the advent of the European invasion in the area which

became the United States, the Indian tribes lost many freedoms and became subject to these powers. In exchange for the total freedom previously enjoyed, the tribes were given certain lands and were allowed to continue self government while on those lands. So long as Indians retain tribal relations on these lands they are regarded not as nations or states, and not fully sovereign, but as a separate people with the power to govern their own internal affairs. *United States v. Kagama*, 118 U.S. 375 (1886).

The aboriginal sovereignty possessed by the Indian tribes was not quickly lost. Initially, Indian lands and communities were distinct, and within those lands and communities the laws of a state had no force. The Indians, subject to Congressional supervision, reigned supreme. States did not even have authority to apply state laws to non-Indians in Indian country. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

As the nation expanded westward, day to day contact of the non-Indian world with the Indian tribes increased. With each new problem presented the totality of Indian sovereignty was eroded. State law was allowed to reach into the reservation and govern criminal activities of non-Indians against other non-Indians on the reservation. *United States v. McBratney*, 104 U.S. 621 (1881). States were allowed to extend jurisdiction into Indian country to govern other activities of non-Indians. Generally, state laws which do not interfere with tribal rights may be imposed on non-Indians on the reservation. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980).

In spite of the eroded sovereignty however, absent a governing act of Congress state law still has no effect in Indian country if that law would affect a tribe's ability to make its own rules and be governed by them. *Williams v. Lee*, 358 U.S. 217 (1959). This much traditional sov-

ereignty has been retained, and it is this retention which forbids general statewide subject matter jurisdiction in Indian country. Consequently, states may not tax Indians on the reservation for activities conducted there, *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973); state hunting and fishing laws have no application in Indian country, *New Mexico v. Mescalero Apache Tribe,* ..... U.S. ....., 51 LW 4741 (1983); and Indian litigants may not make use of state courts to resolve civil disputes arising on the reservation, *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971).

As a general rule, it is only when off the reservation that all state laws are made applicable to Indians. *Mescalero Apache Tribe v. Jones,* 411 U.S. 145 (1973). It is only for off reservation occurrences that Indians have traditional and undeniable access to state courts and remedies.

This right of access for off reservation activities has created in some courts, and in the Indian tribes, the mistaken belief that traditionally they may make use of state courts to resolve disputes arising on the reservation. (Brief of the United States as Amicus Curiae, pp. 6-15; Brief of Petitioner, pp. 14-32.) During the course of these proceedings Three Tribes and the Solicitor General have cited at one time or another the cases of *Felix v. Patrick,* 145 U.S. 317 (1892), and *United States v. Candelaria,* 271 U.S. 432 (1926) as the traditional foundation supporting Indian access to State courts for on reservation activities. Reliance upon these two cases is misplaced.

Felix v. Patrick, 145 U.S. 317 (1892), must be limited by its facts. In that case, a Minnesota Indian had received scrip entitling her to real property in Nebraska. This scrip was transferred under some apparently fraudulent scheme to non-Indians. The heirs of that Minnesota In-

dian, twenty years after the fraud, brought an action to set aside the transfer. In deciding whether the action by the heirs was barred by laches, this Court ruled Indians could use the Nebraska courts. It is the facts of this case which must limit the holding of *Felix*. The case merely asserts Indians can use state courts to resolve disputes arising off the reservation. State courts would still, even under *Felix*, be barred from making its state laws generally applicable in Indian country. Extending the holding of *Felix* to sanction state jurisdiction over on reservation occurrences would have required the Court in 1892 to overrule *Worcester v. Georgia*. *Worcester* has not been overruled. *Williams v. Lee*, 358 U.S. 217 (1959). *Felix* is but an early expression by this Court that Indians are subject to state laws while off the reservation, and may use state courts to enforce state created rights for off reservation occurrences.

United States v. Candelaria, 271 U.S. 432 (1926), has been misread. In that case, this Court addressed two issues. The first involved questions of guardianship and the United States' duties as trustee. The second issue asked whether the courts of New Mexico had subject matter jurisdiction over a suit brought by the Pueblo Indians to settle Pueblo land rights. This Court ruled that New Mexico courts had such jurisdiction, but jurisdiction was limited and only arose due to the very special nature of the Pueblo's history.

The Pueblo Indians received their lands under grants from Spain and Mexico. When the United States purchased the Gadsden territory it agreed to honor these Spanish and Mexican grants. Hence, the Pueblo Indians are in a unique position holding their lands not as reservations under separate treaty with the United States, but in fee simple tracing title to grants from the Kings of Spain.

In order to enable the Indians to protect this fee simple ownership, the territorial laws of New Mexico, and later the state laws of New Mexico and Arizona, were required by Congress to recognize the Pueblo Indians as bodies corporate with the full power to sue in state courts to defend their land titles. Judicial recognition of this corporate capacity is the specific holding of *Candelaria,* 271 U.S. at 442, and 443. See also, *Lane v. Santa Rosa,* 249 U.S. 110 (1919).

The implications of *Candelaria* are quite different from that for which it is cited. If the Pueblo Indians had traditional power to use state courts as is argued by Three Tribes and the Solicitor General, why did Congress require inclusion in territorial laws, and later state laws, of provisions which make the Pueblos a legal entity for purposes of maintaining a suit in state court? Assuming for a moment that Congress does not perform an idle act, but only acts when necessary, the implication is that the Pueblo Indians would not have had access to state courts without an act of Congress making the Pueblos a body corporate capable of bringing suit.

Wold Engineering does not dispute the *Felix* rule insofar as it guarantees Indians access to state courts for off reservation occurrences. But, to expand the holding of that case to create a historical foundation establishing a right of access by Indians to state courts for all on reservation occurrences overstates the case. The holding of *Candelaria* likewise must be limited to its facts. Applying the ruling to anything more gives the case more significance than is merited. These cases simply cannot form a foundation upon which to establish a tradition of tribal or individual access to state courts for actions arising on a reservation. These two cases must, upon close inspection, support only the conclusion that Indians may use state courts for off

reservation activities, *Felix*, or may use state courts to enforce their rights when that right of access has expressly been created by a specific act of Congress, *Candelaria*.

Three Tribes and the Solicitor General argue that there is a national tradition which recognizes access, and cite to *McClanahan v. Arizona State Tax Commissioner*, 411 U.S. 164 (1973), and other tax cases. The Solicitor General specifically notes that in *McClanahan* the Indian plaintiff initiated his suit in state court. (Brief of United States, p. 9.) Three Tribes points to a similar case in North Dakota. *White Eagle v. Dorgan*, 209 N.W.2d 621 (N.D. 1973).

As argued above, these tax cases do not establish a history or tradition of access by Indian tribes to state courts, but only establish that line of cases referred to in *New Mexico v. Mescalero Apache*, where state courts must recognize the existence of those state and tribal interests at stake which justify state jurisdiction. ..... U.S. ....., 51 LW 4741, at 4743. A tax case is a case of such exceptional circumstances that it justifies state jurisdiction. A tort case arising on the reservation between private litigants, one of which happens to be an Indian tribe, does not create this same exceptional circumstances.

Likewise, the Solicitor General points to the decisions in various other state jurisdictions wherein Indian litigants have been granted access to the courts in those states. (Brief of United States, p. 10.) That other state courts have reacted to federal policy in a way which is inconsistent with that policy should in no way prejudice the North Dakota ruling.

The decision of the North Dakota Court is consistent with federal history, and does not transgress any federal tradition.

3. Public Law 280 As Enacted And Amended Must Be Considered In Front Of The Backdrop Of History And Tradition.

The relevant federal statute to be read in front of the backdrop of tradition and history is P.L. 280 (Chapter 505 U.S. Statutes at Large 67), as enacted, and as amended by 25 U.S.C. §1322(a), and 25 U.S.C. §1326.

P.L. 280 divided the states into three groups. The first group, the five so-called mandatory states, was given immediate civil and criminal jurisdiction over actions arising in Indian country. Group two consisted of those states which had Enabling Act disclaimers. Those states were given authority to alter their constitutions and laws in order to assume jurisdiction. §6, P.L. 280. The third group contained all other states. §7, P.L. 280. North Dakota is within the second group. Under P.L. 280, the states in groups two and three had the power to unilaterally assume all subject matter jurisdiction in Indian country provided the mechanics of the act were followed. *Kennerly v. District Court of Montana*, 400 U.S. 423 (1971).

Three Tribes and the Solicitor General argue that P.L. 280 was intended to foster the assumption of new civil jurisdiction by states in Indian country, and that jurisdiction previously asserted remained as always. (Brief of Petitioner for Certiorari, p. 11; Brief on the merits of United States, p. 18.) This assertion is not correct.

The primary purpose of P.L. 280 was to foster state assumption of criminal jurisdiction, and relieve the federal government of the burden of law enforcement on the reservations. *Bryan v. Itasca County*, 426 U.S. 373 (1976). As one commentator has noted, the P.L. 280 grant of civil jurisdiction was simply an afterthought:

> "Most likely, civil jurisdiction was an afterthought in a measure aimed primarily at bringing law and order to the reservations, added because it comported with the pro-assimilationist drift of federal policy, and because it was convenient and cheap."

Goldberg, Carol E., *P.L. 280: The Limits of State Jurisdiction Over Reservation Indians,* 22 UCLA L.Rev. 535, at 543, and 544 (1975).

Presuming this commentator is correct, the question which arises now is, in light of the traditional lack of jurisdiction possessed by the states, what jurisdictional obligation does this afterthought thrust onto the state?

The North Dakota Supreme Court has decided that P.L. 280 authorized the State, through initiated and legislative action, to amend its Constitutional disclamier and enact any necessary statute. That Court concluded that the voice of the people, including the affected Indians, had spoken in the initiated measure amending the State Constitution, and by legislative enactment of Chapter 27-19, NDCC. *In re Whiteshield,* 124 N.W.2d 694 (N.D. 1963). Three Tribes argues today that the State failed to act properly under P.L. 280 and therefore the adoption by North Dakota of Chapter 27-19, NDCC, is a nullity. (Brief of Petitioner, p. 32.) After reading §6 of P.L. 280, it is hard to imagine what more North Dakota could have done under the Act in order to comply. P.L. 280 requires an amendment to the State's Constitution. North Dakota amended its Constitution. Article 16, §203 as amended in 1959. (Now renumbered in North Dakota Constitution as Article 13, §1, Clause 2.) The Act requires the passage of legislation accepting jurisdiction. North Dakota passed legislation accepting jurisdiction. Chapter 27-19, NDCC. P.L. 280 requires nothing more.

What P.L. 280 did not require is that the State include a provision granting to the Indian tribes an opportunity to consent. Adding this consent provision was the only action taken by North Dakota which was outside of P.L. 280. If adding this consent provision is "expressly the kind of state legislative scheme that this Court has identified as failing to meet the strict federal requirements of 'affirmative state legislation'" (Brief of Petitioner, p. 32), it results from a very clever trap set by the North Dakota Indian tribes in 1963. In 1963, the North Dakota legislature stood ready to unilaterally assume all jurisdiction in Indian country. However, at State legislative hearings, the various Indian tribes and their representatives appeared and specifically asked for the inclusion of the very consent provisions objected to now. (North Dakota Legislative History, see Appendix to Brief in Opposition to Amicus, Standing Rock.) If Three Tribes's argument is correct, the North Dakota Indian tribes duped the State legislature into acting improperly under P.L. 280, and then waited twenty years to spring the trap. Such underhanded play hardly comports with traditions of justice.

If the standard for proper state response under P.L. 280 is the manifested willingness by political action of the state to accept and discharge new responsibilities, *Washington v. Yakima Indian Nation*, 439 U.S. 463, at 486-487 (1979), North Dakota met this standard in 1963 and fully discharged its obligation under P.L. 280. The additional attempt by the State to appease the expressed fears of the Indian tribes within the State cannot now be used by those same Indian tribes to destroy this otherwise valid state action. The State has met all P.L. 280 requirements.

In reviewing the State's action under P.L. 280, the State Supreme Court ruled that the State had disclaimed

entirely jurisdiction over actions in Indian country and involving Indian litigants until such time as the Indians themselves consent to state jurisdiction. *In re Whiteshield*, 124 N.W.2d 694 (N.D. 1963). This decision has been the justification for all North Dakota decisions on jurisdiction in Indian country.

Three Tribes and the Solicitor General argue that P.L. 280 does not authorize such a disclaimer, and that it is therefore forbidden. (Brief of Petitioner, pp. 32-38; Brief of United States, pp. 15-25.) This argument is similar to the argument rejected by this Court in *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979). In that case, the tribe contended that the assumption of partial subject matter jurisdiction by Washington State, because not specifically authorized by P.L. 280, was forbidden and Washington's checkerboard subject matter jurisdiction was violative of P.L. 280. In that case it was held that:

> "To find that under Pub L 280 a State could not exercise partial jurisdiction, even if it were willing to extend full jurisdiction at tribal request, would be quite inconsistent with this basic history." *Washington*, 439 U.S. at 497.

This Court further found:

> "The State of Washington in 1963 could have unilaterally extended full jurisdiction over crimes and civil causes of action in the entire Yakima Reservation without violating the terms of Pub L 280. We are unable to conclude that the State, in asserting a less intrusive presence on the Reservation while at the same time obligating itself to assume full jurisdictional responsibility upon request, somehow flouted the will of Congress. A State that has accepted the jurisdictional offer in Pub L 280 in a way that leaves substantial play for

> tribal self-government, under a voluntary system of partial jurisdiction that reflects a responsible attempt to accommodate the needs of both Indians and non-Indians within a reservation, has plainly taken action within the terms of the offer made by Congress to the States in 1953. For Congress surely did not deny an option State the power to condition its offer of full jurisdiction on tribal consent." *Washington*, 439 U.S. at 499.

In the case at hand, North Dakota, an option State, stands willing to extend full jurisdiction at tribal request, but is declining to accept any jurisdiction absent that request. Like Washington, North Dakota could have unilaterally taken all jurisdiction into its hands in 1963. It is not reasonable to conclude that North Dakota, in asserting no intrusive presence on the reservation, while at the same time standing willing to accept full jurisdictional responsibility at tribal request, has somehow flouted the will of Congress. North Dakota has accepted the jurisdictional offer in P.L. 280 in a way that leaves substantial play for tribal self-government, and has taken action within the terms of the offer made by Congress. If, as was concluded in *Yakima*, Congress did not intend to deny an option State the power to condition its offer of jurisdiction on tribal consent, then North Dakota's offer of jurisdiction, and its decline of all jurisdiction until the Indian tribes consent, is surely also justifiable under P.L. 280. Washington, in the *Yakima* case, was working under P.L. 280 from a checkerboard and covering the interstices on tribal request. North Dakota has chosen, under P.L. 280, to work from a clean slate and to write on that slate only on tribal request. The difference in response by the two states is but one of degree, and that North Dakota has conditioned all jurisdiction on tribal consent should not be condemned.

North Dakota did not do violence to the purpose and plan of P.L. 280 by disclaiming all jurisdiction. The conditions placed upon State assumption of jurisdiction have been known to Three Tribes for twenty years. That Three Tribes has failed to approach the State and hold an election as required by State law in an effort to reach a reasonable solution to an ongoing problem is not justification to now allow Three Tribes to smash down the courthouse doors. The keys to the courthouse have always been in Indian hands under the North Dakota response to P.L. 280. Even in this case, the District Court Judge, Wallace D. Berning, dismissed this action without prejudice stating that if Three Tribes held elections as required, it would be free to reinstitute its lawsuit. (Order of Dismissal, Appendix to Petitioner's Writ of Certiorari, 1a.) This appeal would not be necessary had Three Tribes taken the reasoned choice the Indians themselves had asked for. The North Dakota response to P.L. 280 is justifiable under the terms of P.L. 280, and also in terms of the backdrop of history and tradition. This response should therefore withstand the scrutiny of this Court.

Three Tribes and the Solicitor General argue that P.L. 280 does not authorize a state to disclaim jurisdiction it asserted prior to P.L. 280. (Brief of Petitioner, pp. 14-27; Brief of United States, pp. 15-25.) Prior to P.L. 280, North Dakota did allow suits brought by Indians for actions arising in Indian country. In the reported North Dakota case, P.L. 280 had been passed, but the State's Constitution had not been amended to remove the Enabling Act disclaimer. Nonetheless, in reviewing the tort claim of an Indian plaintiff against an Indian defendant for an action arising in Indian country, it was held that the State courts were open to suits involving Indians both as defendants and as plaintiffs so long as no question of Indian land was present. *Vermillion v. Spotted Elk*, 85 N.W.2d 432 (N.D. 1957).

If the State and tribes concluded in 1957 that North Dakota courts had subject matter jurisdiction over actions involving Indian litigants and arising within an Indian reservation, and if the purpose of P.L. 280 was to enable states to assume only new jurisdiction and would not work to oust any old jurisdiction, then, the subject matter jurisdiction previously asserted by North Dakota courts remained. In short, if the interpretation of P.L. 280 advanced by Three Tribes and the Solicitor General is given effect the North Dakota courts would be able to assert jurisdiction over all cases arising in Indian country regardless of whether an Indian was plaintiff or defendant. The only operative question which would be required is whether a question of Indian land is present. If no land was in question, all suits could be heard. However, *Vermillion* is erroneous and would fail under present analysis. *Williams v. Lee*, 358 U.S. 217 (1959). *Gouerneau v. Smith*, 207 N.W.2d 256 (N.D. 1973). *Vermillion* cannot be relied upon as the precedent to establish North Dakota jurisdiction in Indian country prior to the enactment of P.L. 280. Without *Vermillion*, nothing remains which would justify the assertion that North Dakota properly exercised any judicial power in Indian country over Indian litigants prior to P.L. 280.

North Dakota historically has followed federal policy as expressed in the State's Enabling Act and original Constitution. It has rejected all notions of residual jurisdiction. *Nelson v. Dubois*, 232 N.W.2d 54 (1975). After P.L. 280, the State has consistently disclaimed all power in Indian country, and conditioned its acceptance of any power upon tribal request. This condition arose at Indian request (North Dakota Legislative History) and has been fully known by the Indian tribes for 20 years. Three Tribes cannot now be heard to complain of the consistent

position maintained by this State, and of its own failure to approach the State to work out a reasonable jurisdictional scheme amenable to all.

P.L. 280 has been amended by later legislative action. Those amendments, 25 U.S.C. §1322(a), and 25 U.S.C. §1326, were enacted as part of the Indian Civil Rights Act of 1968. This act, and these amendments reflect Congressional intent to promote Indian self-government. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978). However, the amendments, consistent with P.L. 280, still envision the eventual assumption of jurisdiction in Indian country by the states, and merely condition that assumption on Indian consent. 25 U.S.C. §1326.

These amendments have been read to require strict state and tribal compliance with P.L. 280, and the amendments by the states and the Indian tribes. *Kennerly v. District Court of Montana,* 400 U.S. 423 (1971); *McClanahan v. Arizona State Tax Commissioner,* 411 U.S. 164 (1973).

In *Kennerly,* a tribe attempted to confer jurisdiction in Montana State Court by passing a tribal ordinance through the tribal council. No polling of the Indians living on the reservation was had. This attempt was struck down by this Court which stated:

> "We think the meaning of these provisions is clear: the tribal consent that is prerequisite to the assumption of state jurisdiction under the provisions of Title IV of the Act must be manifested by majority vote of the enrolled Indians within the affected area of Indian country. Legislative action by the Tribal Council does not comport with the explicit requirements of the Act." *Kennerly,* 400 U.S. at 429.

In the State's response to P.L. 280, North Dakota conditioned any assumption of jurisdiction in Indian country upon the request of the affected Indian tribes. This condition is consistent with the current federal statute, 25 U.S.C. §1326, which requires essentially the same action. This State's willingness to allow the Indians a voice in their own destiny, while at the same time standing ready to assume all jurisdiction upon tribal request, meets with all federal requirements set forth in P.L. 280, and the Indian Civil Rights Act. Three Tribes has failed to take any action to manifest by majority vote its consent to State jurisdiction on its Reservation. Any action other than this vote will not satisfy the explicit requirements of current federal law. Three Tribes's ad hoc approach to state jurisdiction does not satisfy the rule laid down in *Kennerly* and is therefore void.

In *McClanahan* this Court ruled that the failure by a state to secure tribal consent before attempting to assume jurisdiction would be fatal to that jurisdiction in Indian country. North Dakota stands ready to assume jurisdiction *only* on tribal consent. This position is in total compliance with the *McClanahan* rule.

These two cases point to the conclusion that under current law only by strict state and tribal bilateral action can any exercise of state jurisdiction over actions involving Indian litigants occur. The tribal action which is required has not taken place since no tribal election has been held. Three Tribes is subject to these provisions and its failure to comply with that law is fatal to its attempt to force jurisdiction upon the courts of North Dakota. Further, any action by a North Dakota court to take such forced jurisdiction without strict compliance with the provisions of P.L. 280, and the Indian Civil Rights Act would be void.

The meaning Three Tribes and the Solicitor General ascribe to P.L. 280, and the Indian Civil Rights Act will not advance the clear purpose of these laws: that is, to remove the status of wardship and place jurisdictional responsibility with the states. *Williams v. Lee*, 358 U.S. 217 (1959).

If Indians are allowed access to state courts for all purposes as plaintiffs, and may escape the power of that same court when they are defendants, what incentive remains for the Indian tribes to ever enter the non-Indian world as full fledged members of that world? Having the best of the judicial world they will remain forever a people dependent upon the federal guardian.

The decision of the North Dakota Court will advance federal policy. This decision makes clear to the Indian tribes that if they wish to use the State's courts for one purpose, they must follow the federal guidelines and make themselves available to State court for all purposes. The decision permits the Indians to make a choice as responsible full fledged citizens of this country and state, and cast off the limitations of dependent status. As soon as they exercise their vote and choose to accept State court jurisdiction, the purpose of P.L. 280 and the Indian Civil Rights Act will be fulfilled.

The decision of the North Dakota Court is consistent with the plain meaning expressed by the language of both P.L. 280 and the Indian Civil Rights Act. This statutory language must be given primary consideration, and should be deemed conclusive. *Dickerson v. New Banner Institute, Inc.*, ... U.S. ....., 75 L Ed 2d 845 (1983); *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980).

P.L. 280, as amended by 25 U.S.C. §1322(a) allows the state to assume jurisdiction in Indian country over "civil

causes of action between Indians or to which Indians are parties." The language does not limit assumption to those cases where Indians are defendants, but limits it to all actions by or against Indians.

The language used in P.L. 280 and the Indian Civil Rights Act is clear and the North Dakota decision is reasonable based upon that language. But, even if the language is ambiguous as is argued by the Solicitor General (Brief of United States, pp. 24-25) that language need not be construed in favor of the Indian tribes. The canon of construction urged by the Solicitor General does not stretch so far as to require a specific manner in which the states are to modify their organic legislation on the basis of language which is at best capable of speculative meaning. *Washington v. Yakima Indian Nation*, 439 U.S. at 484. Thus, that North Dakota has interpreted the language of P.L. 280, and the Indian Civil Rights Act to allow the State to disclaim all jurisdiction over all actions involving Indians as parties and arising in Indian country until the Indian tribes ask for such jurisdiction is not unreasonable. It is a straightforward response to the law in question, and is in keeping with the conditions asked for by the North Dakota Indian tribes. (North Dakota Legislative History.)

This reasonable response should not be disturbed. In the final preemption analysis it is clear that North Dakota's reaction to P.L. 280 and the Indian Civil Rights Act is in keeping with the notions of history and tradition. The action taken by the State court in this case is in line with the legislative intent behind the passage of these laws and will promote the fulfillment of that intent. The decision is justifiable under the plain meaning of the statutory language, or if such language is of questionable meaning, the State's response is nonetheless reasonably

calculated to comport with the intent of the law. The action of the State of North Dakota is entirely justifiable. The decision of the North Dakota Court based on that law ought to be affirmed.

B. The Decision Of The North Dakota Supreme Court Does Not Deny Equal Protection Of The Laws To Indian Litigants.

The unique legal status of Indian tribes under federal law permits federal legislation which would single Indian tribes out for special treatment. That Indians have different standing under the law is deemed to be politically based and therefore is not constitutionally offensive. *Morton v. Mancari*, 417 U.S. 535 (1974). Under this unique legal status Indians may have a different standing than non-Indians for purposes of jurisdiction. This jurisdictionally different standing may result in a denial of a forum to Indian litigants which is otherwise available to non-Indian litigants. This is to be expected and is not constitutionally offensive. *Fisher v. District Court*, 424 U.S. 382 (1976).

It is argued by the Solicitor General and Three Tribes that the decision of the North Dakota Court, in spite of the *Morton* and *Fisher* decisions, denies due process to the tribes, and that while the federal government may single Indians out for special treatment, the states do not enjoy the same relationship. Therefore, the actions by a state which single Indians out for special treatment are violations of the Constitutional guarantees of equal protection.

This states only half the argument. This Court held in *Washington v. Yakima Indian Nation* as follows:

> "It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians,

legislation that might otherwise be constitutionally offensive. *Morton v. Mancari*, 417 US 535, 551-552, 41 L Ed 2d 290, 94 S Ct 2474. States do not enjoy this same unique relationship with Indians, but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians. The jurisdiction permitted under Chapter 36 is, as we have found, within the scope of the authorization of Pub L 280. And many of the classifications made by Chapter 36 are also made by Pub L 280. Indeed, classifications based on tribal status and land tenure inhere in many of the decisions of this Court involving jurisdictional controversies between tribal Indians and the States, see, e.g., *United States v. McBratney*, 104 US 621, 26 L Ed 869. For these reasons, we find the argument that such classifications are 'suspect' an untenable one. The contention that Chapter 36 abridges a 'fundamental right' is also untenable. It is well established that Congress, in the exercise of its plenary power over Indian affairs, may restrict the retained sovereign powers of the Indian tribes. See, e.g., *United States v. Wheeler*, 435 US 313, 55 L Ed 2d 303, 98 S Ct 1079. In enacting Chapter 36, Washington was legislating under explicit authority granted by Congress in the exercise of that federal power." *Washington v. Yakima Indian Nation*, 439 U.S. at 500 and 501.

North Dakota, like Washington State, does not enjoy the same unique relationship with the Indian tribes as does the federal government. However, Chapter 27-19, NDCC, North Dakota's legislative response to P.L. 280, is not simply another state law. As Washington's Chapter 36, Chapter 27-19, NDCC, was enacted in response to a fed-

eral measure designed to readjust the allocation of jurisdiction over Indians. The North Dakota law creates an obligation for the State to accept responsibility for this allocation, and places the burden upon the Indian tribe to make effective that allocation. §27-19-02, NDCC. If P.L. 280 does not abridge a fundamental right, and North Dakota, as Washington, acted under the explicit authority granted by Congress the action of the State is not constitutionally impermissible. No suspect racial classifications have been made by the State, and no fundamental rights have been abridged. Three Tribes's argument is an untenable one since the State only acted in accordance with the specific classifications allowed by Congress.

In its Petition for Certiorari Three Tribes argued the action taken by the State denied Three Tribes equal protection since the Court's decision denies the Indians access to a forum of dispute resolution. Three Tribes relied on *Boddie v. Connecticut,* 401 U.S. 371 (1971) to support this argument. (Petition for Certiorari, pp. 13-14.) *Boddie* was not based on the equal protection clause of the Constitution, but rather was based on the due process analysis. However, Justice Brennan, in his concurring opinion states that such denial of access is a denial of both equal protection and due process. Even in that light, *Boddie* is still not reliable precedent for this case.

Under *Boddie,* a state jurisdictional requirement may offend equal protection if it operates to foreclose a particular party's opportunity to be heard. This Court stated:

> "The state's obligations under the 14th Amendment are not simply generalized ones; rather, the state owes to each individual that process which, in light of the values of a free society, can be characterized as due." *Boddie,* 401 U.S. at 380.

Thus, a state's obligations under the equal protection clause are not general ones; rather, the state owes to each individual that protection which, in light of the values of a free society, can be characterized as equal.

The protection urged by Three Tribes in this case is that it be allowed to sue a non-Indian litigant in state court. At the same time, Wold Engineering, the non-Indian litigant, which had asserted a counterclaim against Three Tribes would be denied access to that same court for resolution of an issue which arose in the same case. This position was advanced by counsel for Three Tribes in oral argument to the North Dakota Supreme Court. That counsel argued that Wold Engineering would be required to take its counterclaim to Tribal Court for resolution. Counsel admitted in oral argument before the North Dakota Supreme Court, Tribal Court was without jurisdiction to hear causes where the dollar value involved in the dispute exceeded $300.00. The protection afforded by such a society which would allow this to occur is obvious, but it is hardly equal, and it is not in keeping with the values held by our free society.

The Solicitor General argues, citing *Plyler v. Doe,* 457 U.S. 202 (1982), that the effect of the North Dakota decision deprives Indians of a fundamental right of access to the State's courts without authorization of the federal government, and without any federal policy support which makes the North Dakota decision appropriate. (Brief of United States, p. 26.) In *Plyler,* this Court noted:

> "The Equal Protection Clause directs that 'all persons similarly circumstanced shall be treated alike.' *F.S. Royster Guano Co. v. Virginia,* 253 US 412, 415, 64 L Ed 989, 40 S Ct 560 (1920). But so too, '[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they

were the same.' *Tigner v. Texas*, 310 US 141, 147, 84 L Ed 1124, 60 S Ct 879 (1940). The initial discretion to determine what is 'different' and what is 'the same' resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose." *Plyler*, 457 U.S. at 216.

Indians reside in a unique political environment. Residing in this unique environment means they are not people similarly circumstanced. The Indian world, being different in fact, need not be treated in law as though it were the same as the non-Indian world. From the very outset of this nation's history the Indian nations and the Indian world have not been treated in law as though it were the same as the non-Indian world. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832).

The determination that this Indian world is different has been made in the Constitution. U.S. Const., Art. I, §8, Cl. 3. The Congress, and the State Legislature should have substantial latitude to establish the classifications that roughly approximate the nature of the problem perceived, and to accommodate the interests involved. North Dakota's response to the jurisdictional problems it faced in relation to the unique Indian environment present within its borders was to enact a legislative scheme which approximates the nature of the problems perceived by both the State, and the Indian tribes. (North Dakota Legislative History.) The

State's total disclaimer of jurisdiction resulted from the specific request and testimony presented by the North Dakota Indian tribes who told the State that jurisdiction on the reservations was an all or nothing at all proposition. (North Dakota Legislative History, see testimony of Marvin Sonosky, Attorney for Standing Rock Sioux Tribe, p. 9, Objection to Amicus of Standing Rock.)

This Court, in applying equal protection analysis to this State action, need only seek assurance that the action bear a fair relationship to legitimate public purpose. Here such a fair relationship exists, the Indian tribes receiving precisely the jurisdictional protections they requested.

Three Tribes and the Solicitor General argue that somehow the North Dakota legislative blueprint and judicial decision works to harm a discrete and insular minority and therefore must advance a compelling State interest. But, the North Dakota decision is not racially motivated. The decision merely reflects the actual political differences presented. This reflection is not constitutionally offensive. *Morton v. Mancari*, 417 U.S. 535 (1974). Further, the legislation is not designed to disadvantage the Indian tribes. Rather, the legislation was passed in direct response to Congressional mandates and to the requests made by the Indian tribes that this State assume no jurisdiction within their lands.

The North Dakota legislation advances a legitimate public purpose, was designed to accommodate Indian needs and requests, and is not racially motivated. Therefore, it need not be subjected to strict scrutiny to determine if it advances a compelling state purpose. The decision of the North Dakota Court furthers the purpose of the statute, and therefore ought to be affirmed.

The Equal Protection Clause, in relation to the right of access to a Court, guarantees a right to a meaningful

opportunity to be heard within the limits of practicality. The Clause guards against particular laws which may jeopardize this right. *Boddie*, 401 U.S. at 380 and 381.

Such an opportunity has not been denied to Three Tribes. However, a condition has been placed on it. That condition is that the Indian tribes ask the State courts to accept jurisdiction. §27-19-02, NDCC. Once the condition is met, all meaningful opportunity to be heard within the limits of practicality will be granted. There is no particular State created barrier which jeopardizes this right. The only barrier existing rests with Three Tribes itself which wishes to stay free of State court as a defendant, but also wishes to use the State courts when, as a plaintiff, it will suit its purpose.

While the State District Court Judge Wallace D. Berning ruled to dismiss this action initially, he did so without prejudice. (Dismissal, Petition for Certiorari, p. 1a.) He left the door open to Three Tribes to work within the limits of practicality and preserved Three Tribes's meaningful opportunity to be heard. Three Tribes's action and all future actions can be initiated at any time after Three Tribes votes to accept the State court jurisdiction.

Three Tribes argues that the North Dakota Constitution guarantees to every man that the Courts of this State shall be available for redress of wrong. (Brief of Petitioner, p. 39.) In order for this provision to have meaning, a corollary must be added which states that all men shall likewise be answerable in those Courts for the wrongs they have committed. Three Tribes invokes the Constitution of North Dakota to guarantee to itself a forum. At the same time, Three Tribes has manifested no willingness to appear in that same forum and to afford to all

other men the same day in court. This uneven handed justice cannot be condoned, and if Three Tribes desires access to the State's judicial machinery, they should first stand willing to subject themselves fully to that machinery.

The position advanced by Three Tribes is very much the same as that advanced by the criminal defendant in *United States v. Antelope*, 430 U.S. 641 (1977). There, the defendant argued that since Idaho state law would require different proof to achieve conviction, and would result therefore in a more lenient sentence, he should be charged under state law rather than federal law. This court noted the obvious fallacy of such an argument and, in footnote 13, at 430 U.S. 650 stated:

> "The Constitution does not authorize this kind of gamesmanship."

Three Tribes, like the *Antelope* defendant, argues the power to pick a forum which would allow it to recover its full claim if successful. At the same time, Three Tribes insists upon retention of its protected status in order to deny other men the right to bring Three Tribes into that forum as a defendant. Such gamesmanship is totally unjustifiable.

Neither the North Dakota law, nor the decision of the North Dakota Court denies equal protection.

X. CONCLUSION

Two conclusions may be drawn from the Indian cases presented to this Court which have been decided under the preemption analysis. *Washington v. Confederated Tribes*, 447 U.S. 134 (1980) (Rehnquist, J. concurring and dissenting.) From *Bryan v. Itasca County*, 426 U.S. 373 (1976), it was noted that an ambiguous statute would not support a finding which would abolish by implication a pre-existing Indian immunity or right. The second conclusion was drawn from *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973). In that case the conclusion drawn was that when tradition did not recognize a sovereign immunity or right in favor of the Indian tribes, this Court would recognize that right or immunity only if expressly conferred by Congress.

The decision made by the North Dakota Supreme Court does not do violence to the conclusion reached in *Bryan*. Even assuming P.L. 280 is ambiguous, no finding was made by the North Dakota Court which would abolish by implication any pre-existing privilege or immunity. As noted in the argument, the Indian tribes of this nation have not had any traditional or historical access to state courts for resolution of disputes. The two cases uniformly cited as precedent for Indian access to state courts, *Felix* and *Candelaria*, cannot be properly read to expand Indian rights and privileges to use state courts beyond merely concluding that Indians have access to state court for off reservation occurrences. The State court's denial of access in this case is in keeping with tradition and history, and advances the purpose and policy of P.L. 280. It takes nothing from the Indian tribes.

The *Mescalero* conclusion is also supported by the North Dakota decision. Since Indians have no traditional

access to state court for redress of on reservation grievances, no new privilege or immunity wa recognized which had not been expressly conferred by Congress. In this case, tradition recognizes Indian immunity for state court actions. However, no tradition exists, nor could any tradition exist in any free and fair society which would allow Indians to sue non-Indians in state court and then, at the same time hide behind the recognized immunity to stay beyond suit as a defendant. The jurisdictional immunity and privileges enjoyed by Indians cannot be used as both a sword and a shield, and no express grant of Congress can be pointed to which would create this right. There being no express jurisdictional grant from Congress, and there being present no extraordinary or exceptional circumstances or interests, the decision of the North Dakota Court is correct.

The North Dakota response to P.L. 280 does not deny to Indians equal protection. That response is fully in keeping with the request made by the North Dakota Indian tribes, and advances the purpose of that law. No invidious classifications have been made.

Wherefore, Wold Engineering prays that the decision of the North Dakota Supreme Court be affirmed.

Respectfully submitted this 29th day of August, 1983.

BOSARD, MCCUTCHEON & RAU, LTD.
Attorneys for Wold Engineering
200 Heritage Place
P.O. Box 939
Minot, North Dakota 58702-0939

By: HUGH MCCUTCHEON

APPENDIX

Enabling Act of February 22, 1887, Chapter 180, 25 Statutes at Large 676, Section 4, Clause 2.

> "Second. That the people inhabiting said proposed states do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said states shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the states on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said states from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said states so long and to such extent as such act of Congress may prescribe."

Public Law 280, Chapter 505, U.S. Statutes at Large 67.

AN ACT

"To confer jurisdiction on the States of California, Minnesota, Nebraska, Oregon, and Wisconsin, with respect to criminal offenses and civil causes of action committed or arising on Indian reservations within such States, and for other purposes.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That chapter 53 of title 18, United States Code, is hereby amended by inserting at the end of the chapter analysis preceding section 1151 of such title the following new item:

" '1162. State jurisdiction over offenses committed by or against Indians in the Indian country.'

"SEC. 2. Title 18, United States Code, is hereby amended by inserting in chapter 53 thereof immediately after section 1161 a new section, to be designated as section 1162, as follows: " '§1162. State jurisdiction over offenses committed by or against Indians in the Indian country

" '(a) Each of the States listed in the following table shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over offenses committed elsewhere within the State, and the criminal laws of such State shall have the same force and effect within such Indian country as they have elsewhere within the State:

"'State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"'(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall deprive any Indian or any Indian tribe, band, or community of any right, privilege, or immunity afforded under Federal treaty, agreement, or statute with respect to hunting, trapping, or fishing or the control, licensing, or regulation thereof.

"'(c) The provisions of sections 1152 and 1153 of this chapter shall not be applicable within the areas of Indian country listed in subsection (a) of this section.'"

"SEC. 3. Chapter 85 of title 28, United States Code, is hereby amended by inserting at the end of

the chapter analysis preceding section 1331 of such title the following new item:

" '1360. State civil jurisdiction in actions to which Indians are parties.'

"SEC. 4. Title 28, United States Code, is hereby amended by inserting in chapter 85 thereof immediately after section 1359 a new section, to be designated as section 1360, as follows:

" '§1360. State civil jurisdiction in actions to which Indians are parties

" '(a) Each of the States listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State:

" 'State of	Indian country affected
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State, except the Menominee Reservation

"'(b) Nothing in this section shall authorize the alienation, encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

"'(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this action.'

"SEC. 5. Section 1 of the Act of October 5, 1949 (63 Stat 705, ch 604), is hereby repealed, but such repeal shall not affect any proceedings heretofore instituted under that section.

"SEC. 6. Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be, to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: Provided, That the provisions of this Act shall not become effective with respect to

such assumption of jurisdcition by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

"SEC. 7. The consent of the United States is hereby given to any other State not having jurisdiction with respect to criminal offenses or civil causes of action, or with respect to both, as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State shall, by affirmative legislative action, obligate and bind the State to assumption thereof."

Office - Supreme Court, U.S.
FILED
NOV 11 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-629

In The
Supreme Court of the United States
October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,

Petitioner,

vs.

WOLD ENGINEERING and SCHMIDT, SMITH & RUSH,

Respondents.

On Certiorari to the Supreme Court of North Dakota

PETITIONER'S REPLY BRIEF

JOHN O. HOLM,*
17 Second Avenue West
Dickinson, North Dakota 58601
(701) 225-6066

CHRISTOPHER D. QUALE
RAYMOND CROSS
Box 220
New Town, North Dakota 58763
(701) 627-3621

Counsel for Petitioner

*Counsel of Record

November 1983

COCKLE PRINTING CO., 2311 Douglas St., Omaha 68102

TABLE OF CONTENTS

Pages

Table of Authorities i

Introduction 1

Argument:

I. NORTH DAKOTA FAILED TO ASSUME ANY JURISDICTION UNDER PUBLIC LAW 280. 3

II. CONGRESS HAS NOT PREEMPTED STATE JUDICIAL AUTHORITY OVER PETITIONER'S ACTION. 8

III. REVERSAL OF THE STATE COURT'S DECISION IS THE PROPER DISPOSITION IN THIS MATTER. 13

Conclusion 15

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES:

Bank of America National Trust v. Parnall, 352 U. S. 29 (1956) 14

DeCanas v. Bica, 424 U. S. 351 (1976) 9, 14

Goldstein v. California, 412 U. S. 546 (1973) 11

Kennerly v. District Court, 400 U. S. 423 (1971) 4

McClanahan v. Arizona State Tax Commission, 411 U. S. 164 (1973) 9

New Mexico v. Mescalero Apache Tribe, 103 S. Ct. 2378 (1983) 9

TABLE OF AUTHORITIES—Continued

Pages

Ramah Navajo School Board v. Bureau of Revenue, 457 U. S. 3394 (1982) ____ 12

Rice v. Rehner, 103 S. Ct. 3291 (1983) ____ 2, 9

State Tax Commission v. Van Cott, 306 U. S. 605 (1939) ____ 14

Washington v. Yakima Indian Nation, 439 U. S. 463 (1979) ____ 4, 6, 7

White Mountain Apache Tribe v. Bracker, 448 U. S. 136 (1980) ____ 2

Williams v. Lee, 358 U. S. 217 (1959) ____ 2, 11

OTHER FEDERAL CASES:

Poitra v. Demarrias, 502 F. 2d 23 (8th Cir. 1974) ____ 14

Re Van Vliet, 43 F. 761 (C.C.E.D. Ark. 1890) ____ 4

STATE CASES:

Three Affiliated Tribes v. Wold Engineering, 321 N. W. 2d 510 (1982) ____ 13

UNITED STATES STATUTES:

Public Law 280 of 1953, Ch. 505, Sections 6 and 7, 67 Stat. 589. Section 6 repealed by Section 403 (b) of P. L. 90-284, 82 Stat. 79. Section 7 re-enacted by Section 404 of that statute and now codified at 25 U. S. C. § 1324. Section 402(a) codified at 25 U. S. C. § 1322(a). Section 406 codified at 25 U. S. C. § 1326 ____ passim

TABLE OF AUTHORITIES—Continued

Pages

North Dakota Statutes:

N. D. Cent. Code Chapter 27-19 ..... passim

Secondary Sources:

Brown, *The Indian Problem and the Law*, 39 Yale L. J. 307 (1930) 8

Cohen, *Handbook of Federal Indian Law* (University of New Mexico Press, 1971 Reprint) 7, 8, 10

Hazard and James, *Civil Procedure* (2d ed. 1977) 4, 12

Note, *Supreme Court Review Of State Court Questions Involving Multiple Questions*, 95 U.Pa. L. Rev. 764 (1947) 14

No. 82-629

In The

Supreme Court of the United States

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,

Petitioner,

vs.

WOLD ENGINEERING and SCHMIDT, SMITH & RUSH,

Respondents.

On Certiorari to the Supreme Court of North Dakota

PETITIONER'S REPLY BRIEF

INTRODUCTION

Respondent, Wold, and petitioner, Three Affiliated Tribes, agree that the sole issue on review is whether state court jurisdiction over petitioner's action is federally proscribed. Petitioner cannot sue a non-Indian in state court for damages on a state-created cause of action, Wold says, because that would require the state court to exercise jurisdiction that has either been expressly or implicitly denied to it by federal law. (Brief of Respondent, at 12-35.) Wold argues that two facts have special jurisdictional significance under federal Indian law and that the

presence of these facts require the automatic dismissal of claims such as petitioner's under the doctrine of federal preemption. These two facts, Wold says, divest the state court of subject matter jurisdiction whenever an Indian sues a non-Indian in state court on a claim arising on-reservation. (Brief of Respondent, at 9.)

Petitioner disagrees. Wold's conception of federal preemption in Indian law—requiring, as an apparent result, the exemption of non-Indians from suits by Indians—bears no resemblance at all to this Court's flexible application of federal preemption principles as a tool for adjusting the respective jurisdictional claims of states and tribes. *Rice v. Rehner*, 103 S. Ct. 3291, 3295 (1983). (Justice O'Connor, writing in her opinion for the majority, noted that "automatic" exemptions of reservation Indians from state authority are unusual.)

Wold's conception of states and tribes as virtually independent sovereigns—a tribe's sovereignty being automatically impugned if a state court hears a case arising under state law within a reservation—is not the present basis for this Court's administration of the principles of federal preemption in Indian law. *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 141 (1980). Petitioner submits that there is absolutely no reason to prohibit state court jurisdiction over a non-Indian defendant when such a restriction would serve no identifiable tribal or federal interest. *William v. Lee*, 358 U.S. 217 (1959).

ARGUMENT

I.

North Dakota Failed To Assume Any Jurisdiction Under Public Law 280.

Wold claims that the Act of August 15, 1953, 67 Stat. 588, hereinafter called Public Law 280, authorized North Dakota to adjust its judicial jurisdiction so as to preclude Indians from suing non-Indians in state court if the state cause of action involved arose on-reservation. (Brief of Respondent, at 34-35.) Wold does not dispute that the Supreme Court of North Dakota deemed the state's judicial authority to extend to Indians' suits against non-Indians for damages, arising on- or off-reservation, despite Public Law 280's enactment. (Brief of Respondent, at 29-30.) However, Wold argues that North Dakota, consistent with the grant of federal jurisdictional power available to it under Public Law 280, by state legislative action extinguished or disclaimed any independent state judicial jurisdiction over Indian claims against non-Indians. Consequently, Wold urges this Court to affirm the state court's decision below because that court correctly concluded that North Dakota, by enacting Chapter 27-19 of the N.D.C.C. had, as an exercise of federally delegated authority, extinguished all the state's judicial authority over Indian claims arising on-reservation. (Brief of Respondent, at 24-35.)

Petitioner submits that both the legislative history of the federal statute and the plain terms of that act demonsrate clearly that Public Law 280 cannot serve as a tool for the renunciation by a state legislature of its judicial

jurisdiction. First, the legislative record of Public Law 280 shows the Congressional purpose behind that statute to be an orderly transfer of limited federal authority to the states under specified conditions. (Brief of Petitioner, at 16-27.) This Court has recognized that a state's adequate acceptance of such federal authority would enable the state to exercise jurisdiction in certain new subject matter areas where it would otherwise be preempted from doing so. *Washington v. Yakima Indian Nation,* 439 U. S. 463, 479 (1979). State judicial authority, which exists independently of the federal government as an aspect of state sovereignty, would thus be enlarged to embrace these new subject matter areas. Hazard and James, *Civil Procedure* § 12.12 (2d ed. 1977). Public Law 280, in this regard, is fundamentally no different than federal legislation transferring authority to states to act in an area, such as interstate commerce, where they were otherwise preempted. *Re Van Vliet,* 43 F. 761 (C.C.E.D. Ark. 1890).

Second, this Court has given effect to Congress' purpose behind Public Law 280 by construing Section 7 of that statute to require affirmative state legislative action that obligates the state to assume civil or criminal jurisdiction over the subject matter areas offered under the act. *Washington v. Yakima Indian Nation,* 439 U. S. 463, ftn. 30 at 486 (1979). This Court has consequently disallowed state legislation that imposed prior conditions, such as tribal consent, on the assumption of Public Law 280 jurisdiction, as manifestly failing to evidence the necessary unequivocal intent to assume such jurisdictional responsibilities. *Kennerly v. District Court,* 400 U. S. 423, 427 (1971). Wold does not dispute that North Dakota conditioned the assumption of any Public Law 280 jurisdiction

on tribal consent. (Brief of Respondent, at 26.) However, Wold argues that the the North Dakota state legislature was motivated to enact Chapter 27-19 of the N.D.C.C. in its peculiar form out of respect for tribal sovereignty. (Brief of Respondent, at 26-27.) However, the motivations of state legislators—whether they be good or bad—are irrelevant here in determining whether the requirements of Public Law 280 were met.

Respondent asks this Court to ignore the fact that North Dakota never did assume any jurisdiction under Public Law 280—yet sustain this statute as a suitable method for realizing both the implicit and express purposes of Public Law 280. Wold contends that Chapter 27-19 is fundamentally identical with another option state's—Washington's—response under Public Law 280. (Brief of Respondent, at 28.)

Petitioner submits that a comparison of the respective responses of North Dakota and Washington to Public Law 280 reveals not the similarity—but the disparity—of the two approaches. The state of Washington enacted under Public Law 280's authority a jurisdictional statute assuming only partial subject matter and geographic jurisdiction over reservations within that state. The exercise of that jurisdiction was predicated upon the pattern of land tenure within the reservations—Washington assumed full civil and criminal jurisdiction over fee patent lands within the reservation but refrained from exercising such jurisdiction as to the trust lands therein without Indian consent.

This Court, on review, held that Washington's statute constituted an assumption of Public Law 280 juris-

diction because the factual bases for that jurisdiction complied with the Congressional purpose behind the federal statute. The state statute, this Court found, eliminated at least in part the law enforcement hiatus on-reservation. That statute also preserved, as a factual and jurisdictionl distinction, the status of trust lands as remaining free from state regulation. *Washington v. Yakima Indian Nation,* 439 U. S. 463 (1979).

This Court upheld both Washington's partial assumption of jurisdiction as consistent with the requirements of Section 7 of Public Law 280 as well as the rationality of the factual predicates on which Washington conditioned the exercise of that jurisdiction. *Id.,* at 498-500.

North Dakota's statute, Chapter 27-19, shares nothing in common with the Washington statute sustained under Public Law 280 in *Yakima.* Wold would have this Court extend the *Yakima* rationale to sustain under Public Law 280's authority a jurisdictional classification that has as its result the avoidance—not the assumption—of any of the jurisdictional responsibilities offered by Congress under that statute. This Court has already decided, petitioner submits, that such a jurisdictional classification would not evidence the affirmative and responsible legislation required by Section 7 of Public Law 280. *Washington v. Yakima Indian Nation,* 439 U. S. 463, ftn. 30 at 486 (1979).

North Dakota's statute, as construed by the state supreme court, denies state jurisdictional authority based on essentially nominal facts that are demonstrably unrelated to the historical concepts that define state judicial authority in Indian affairs. Washington's statute affirms

the exercise of jurisdiction based on facts that relate directly to concepts that define the respective spheres of state and tribal authority. *Yakima,* at 502. By contrast, the state supreme court below assumes that state courts, under Public Law 280, are precluded from hearing suits against non-Indians.

The effect of this decision is to cut off state court remedies against non-Indians that this Court has always viewed as available to Indian people. Both petitioner and the United States, as Amicus Curiae, have pointed to decisions of this Court spanning nearly a century acknowledging the Indians' right to sue non-Indians in state court to protect their property rights. (Brief of Petitioner, at 27-32; Brief of the United States, as Amicus Curiae, at 6-15.)

North Dakota claims federal authority to legislate against, not consistent with, the general principle of federal Indian law that Indians have the capacity to sue non-Indians in state court absent some overriding tribal or federal interest that precludes state court jurisdiction. Cohen, *Handbook of Federal Indian Law,* at 162 (University of New Mexico Press, 1971 Reprint). That Public Law 280 has not changed this rule is evidenced by this Court's decisions affirming Indians' right to sue non-Indians in the state courts of Public Law 280 and non-Public Law 280 states alike. (Brief of Petitioner, at 27-32; Brief of the United States, as Amicus Curiae, at 15-25.)

The state statute, as construed by the North Dakota Supreme Court, does not constitute a realization of the Congressional purposes evident in Public Law 280 as claimed by Wold. Congress did not consent to an exer-

cise of federal jurisdiction that completely disables Indians from suing non-Indians in state court for state remedies.

II.

Congress Has Not Preempted State Judicial Authority Over Petitioner's Action.

Wold argues that even if Public Law 280, as construed by the state court, does not prohibit state court jurisdiction over petitioner's action, principles of federal preemption nonetheless required the state court to dismiss this action. (Brief of Respondent, at 12-23.)

Petitioner disagrees. Federal policy and law favor the right of Indians to sue non-Indians in state court to protect their rights if no overriding tribal or federal interests are implicated in such a suit. Cohen, *Handbook of Federal Indian Law*, at 162 (University of New Mexico Press, 1971 Reprint). Commentators agree that the recognition of Indians' legal capacity to sue non-Indians in state court is an important component of the civil rights of Indian people. Brown, *The Indian Problem and the Law*, 39 Yale L. J. 307 (1930). Federal Indian law—contrary to Wold's assumption—has recognized that state courts provide an important forum for the protection of Indian rights from non-Indians. (Brief of Petitioner, at 27-32; Brief of the United States, as Amicus Curiae, at 15-25.)

Wold makes two arguments in support of the proposition that federal preemption precludes state court jurisdiction over this action:

First, Wold claims there must be an express federal grant of jurisdiction conferring authority on state courts over Indians' suits against non-Indians thus enabling them to hear petitioner's action. (Brief of Respondent, at 6.) Second, Wold claims that allowing Indians access to state courts as plaintiffs to sue non-Indians would defeat the supposed federal goal of assimilation under Public Law 280. (Brief of Respondent, at 33.)

Petitioner submits that under the governing principles of federal preemption in Indian law the presumption runs in favor of state court jurisdiction over state-created causes of action against non-Indians. It has always been presumed that states have a clear interest in regulating the conduct of non-Indians on-reservation either legislatively or judicially. *McClanahan v. Arizona State Tax Commission*, 411 U. S. 164, 179 (1973). Other considerations support this presumption aside from the mere fact the defendant is non-Indian. Here, an Indian sued a non-Indian under state law in state court for damages. Such cases generally raise only issues of local law and procedure that are outside any federal concerns. *DeCanas v. Bica*, 424 U. S. 351, 363 (1976).

Petitioner recognizes that the presumed state interest in regulating non-Indian conduct can be overcome. See *New Mexico v. Mescalero Apache Tribe*, 103 S. Ct. 2378, 2385 (1983). If there were a clear "Congressional plan" to preempt such state authority, either in favor of tribal regulation or federal authority, then such a presumption would have to give way. *Rice v. Rehner*, 103 S. Ct. 3291 (1983). However, petitioner has found no such plan, nor has respondent pointed to any plan, that precludes state

court jurisdiction over non-Indians for claims arising on-reservation. Indeed, petitioner submits that both Congress and this Court assumed and expected Indians to be able to sue in state court for state remedies against non-Indians. (Brief of Petitioner, at 27-32.)

Even before attaining citizenship Indians were regarded in federal law as having the legal capacity to sue in state courts to protect their rights. Cohen, *Handbook of Federal Indian Law*, at 162 (University of New Mexico Press, 1971 Reprint). The convergence of these two principles—the presumption of state authority over non-Indians and the capacity of Indians to sue in state court—established that there is no federal bar to or preemption of state court jurisdiction of a suit against a non-Indian for damages arising from a state-created cause of action. (Brief of the United States, as Amicus Curiae, at 6-25.)

Wold's contention that somehow state court jurisdiction over a suit against a non-Indian has been federally proscribed necessitates a showing of more facts than that an Indian is the plaintiff and that he or she is suing on a state claim that arose on-reservation. Federal preemption is a tool for reconciling the competing rights and interests in a federal system—of which tribes and states are component parts. Sovereignty—tribal and state—is restricted only in cases of clearly improper exercise. This Court declared:

> It is not . . . mere possibility of inconvenience in the exercise of powers but an immediate Constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty.

Goldstein v. California, 412 U. S. 546, 555 (1973), *citing* The Federalist No. 32, p. 243. (This Court in *Goldstein*, by a 5-4 vote, held that Article I, § 8, cl. 8 does not expressly or by inference vest all power to grant copyright protection exclusively in the federal government.)

Wold's second argument for barring petitioner's action likewise has no substance:

> If Indians are allowed access to state courts for all purposes as plaintiffs and may escape the power of that same court when they are defendants, what incentive remains for the Indian tribes to ever enter the non-Indian world as full fledged members of that world? Having the best of the judicial world they will remain forever a people dependent upon the federal guardian. (Brief of Respondent, at 33.)

The answer is that states have an identifiable interest under federal law in regulating the conduct of non-Indians on-reservation. By the same token, tribes have an identifiable interest in regulating the conduct of Indians on-reservation. The underlying rationale supporting this Court's acknowledgement of these respective authorities is not simply deference to tribal or state sovereignty, but a concern for the defendant's rights as well. Judicial jurisdiction requires the application of the law that must govern the case, and that law should be one that the defendant generally considers as governing his or her conduct. This principle, along with considerations of convenience and other practical matters, largely explains the result in *Williams v. Lee*, 358 U. S. 218 (1959). This Court held there that the proper forum for adjudication of an action against an Indian on-reservation is tribal, not state, court. The identity of the plaintiff, a non-In-

dian, was deemed irrelevant in light of the tribal and federal interests at stake. *Id.*, at 222-223. Conversely, similar policies underlie authorizing petitioner's action against respondent, a non-Indian, who is also a non-resident of the reservation. The state court is at home in applying the state law that governs his conduct and he is not required to travel to a foreign forum. Hazard and James, *Civil Procedure*, § 12.29 (2d ed. 1977).

By comparison, Wold's conceptualization of jurisdiction renders reservations and states isolated territories where deference to state or tribal sovereignty requires the sacrifice of the Indian right to access to state court. (Brief of Respondent, at 11.) Wold seems to say that it is paradoxical, but true, that his territorial theory of tribal sovereignty requires the restriction of Indian rights. Consequently, Wold concedes that an Indian may sue a non-Indian in state court as a matter of right for damages off-reservation, but that the Indian is completely foreclosed from doing so if the action arose on-reservation. (Brief of Respondent, at 20.)

The only response possible to Wold's view is that federal Indian law has progressed far beyond this impoverished framework for jurisdiction. This Court has rejected rigid jurisdictional rules that, while they would ease litigation, would not promote the "flexible consideration of the federal, state, and tribal interests at issue." *Ramah Navajo School Board v. Bureau of Revenue*, 457 U. S. 3394, 3403 (1982).

III.

Reversal Of The State Court's Decision Is The Proper Disposition In This Matter.

Petitioner, Three Affiliated Tribes, has requested this Court to reverse the state court decision below. (Brief of Petitioner, at 48.) However, the United States, as Amicus Curiae, has requested this Court to vacate the state supreme court's decision and remand it for further proceedings not inconsistent with this Court's mandate.

Petitioner considers reversal to be the proper remedy because the record below, including the state supreme court's decision, clearly establishes that the state court and the parties to this proceeding view federal law as the basis for barring petitioner's claim in state court. The state court viewed Public Law 280 as empowering North Dakota to bar Indian suits against non-Indians in state court:

> The people of North Dakota and the legislature were acting under explicit authority granted by Congress in the exercise of its federal power over Indians when our Constitution was amended and Chapter 27-19, N.D.C.C., was enacted. *Three Affiliated Tribes v. Wold Engineering*, 321 N. W. 2d 510, 513 (1982).

The record below, as well as the past decisions of the state supreme court, reveal that there is no ambiguity as to the ground for decision by the state court. Petitioner has reviewed the declarations of the state supreme court that North Dakota has no policy against Indians suing non-Indians in state court for a remedy absent the perceived federal bar contained in Public Law 280. (Brief of Petitioner, at 11-14.) The Eighth Circuit Court of Ap-

peals ruled recently that given the past state supreme court decisions, North Dakota has no independent policy against Indians suing in state court. *Poitra v. Demarrias*, 502 F. 2d 23, 27 (8th Cir. 1974). This Court has consistently adhered to the principle that it is for the respective courts of appeals to determine the state law within their respective jurisdictions. *Bank of America National Trust v. Parnall*, 352 U. S. 29, 34 (1956).

This Court has recognized that deference to state authority, as well as principles of federalism, may sometimes require the vacation and remand of a state court's decision for further proceedings. Note, *Supreme Court Review of State Court Questions Involving Multiple Questions*, 95 U.Pa. L. Rev. 764 (1947). However, the state supreme court here has made it clear by repeated decisions that there is no state bar or policy against petitioner's action in state court—but solely a federal bar.

Consequently, there is no ambiguity as to the basis or ground for the state court's decision, and a remand for clarification of what the state law is on the subject is unnecessary. See *DeCanas v. Bica*, 424 U. S. 351, 363 (1976). The North Dakota Supreme Court has already construed Chapter 27-19 of the N.D.C.C. with respect to its own state policy. *Cf., State Tax Commission v. Van Cott*, 306 U. S. 605 (1939). (This Court vacated the decision of the Utah Supreme Court and remanded the case so that the state court could construe the Utah income tax law apart from any question of federal constitutional immunity.)

CONCLUSION

Petitioner submits that Wold has not shown that either federal law or policy bars petitioner's action in state court.

Respectfully submitted,

17 Second Avenue West
Dickinson, ND 58601
(701) 225-6066

JOHN O. HOLM
Counsel for the Three Affiliated Tribes

Legal Department
Three Affiliated Tribes
P. O. Box 460
New Town, ND 58763
(701) 627-3621

CHRISTOPHER D. QUALE
RAYMOND CROSS
Counsel for the Three Affiliated Tribes

MOTION FILED
JUL 29

No. 82-629

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

v.

WOLD ENGINEERING, P.C., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

MOTION FOR LEAVE TO FILE BRIEF OF STANDING ROCK SIOUX TRIBE, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, AND SHOSHONE TRIBE OF THE WIND RIVER RESERVATION AS *AMICI CURIAE*

REID PEYTON CHAMBERS *
KEVIN A. GRIFFIN
SONOSKY, CHAMBERS, SACHSE & GUIDO
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 342-9131

Counsel for Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes of the Fort Peck Reservation and Shoshone Tribe of the Wind River Reservation

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-629

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,
Petitioner,

v.

WOLD ENGINEERING, P.C., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

MOTION FOR LEAVE TO FILE BRIEF OF STANDING ROCK SIOUX TRIBE, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, AND SHOSHONE TRIBE OF THE WIND RIVER RESERVATION AS *AMICI CURIAE*

Pursuant to Rule 36.3, the Standing Rock Sioux Tribe of North and South Dakota, the Assiniboine and Sioux Tribes of the Fort Peck Reservation, Montana, and the Shoshone Tribe of the Wind River Reservation, Wyoming move the Court for leave to file the attached brief *amicus curiae* in support of the petitioner of the above-captioned case. *Amici* requested the parties to consent to the filing of this brief. Petitioner Three Affiliated Tribes has consented, but respondent Wold Engineering has refused consent.

Amici are federally-recognized Indian tribes with established, well-organized tribal governments, including tribal court systems. They have a great interest in this case, since affirmance of the decision below would close

state court doors to Indian and Indian tribal plaintiffs. The tribes are interested, both as entities which may require access to state courts, and as governments concerned for the well-being of their members who may need to sue in state courts, in assuring that Indians are not denied access to those courts. They also have an interest in seeing that the proper balance is struck between state jurisdiction and protection of the jurisdiction and role of the tribal courts. In addition, *amicus* Standing Rock Sioux Tribe, as a North Dakota Tribe, has a direct interest in the outcome of this case.

Amici submit the attached brief in order to assist the Court in recognizing that the decision of the North Dakota Supreme Court is not required or authorized by federal law, and denies Indian plaintiffs equal protection of the laws. Since the jurisdiction of the petitioner differs from that of other Indian tribes, including some of the *amici* tribes, and since these *amici* believe this Court should be aware of the full range of interaction between state and tribal jurisdiction, *amici* request that their motion for leave to file the attached brief *amici curiae* be granted.

Respectfully submitted,

REID PEYTON CHAMBERS *
KEVIN A. GRIFFIN
SONOSKY, CHAMBERS, SACHSE & GUIDO
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 342-9131

Counsel for Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes of the Fort Peck Reservation and Shoshone Tribe of the Wind River Reservation

* Counsel of Record

TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. STATE COURT JURISDICTION OF THIS CASE WOULD NOT INFRINGE ON THE FEDERAL RIGHT OF INDIANS TO TRIBAL SELF-GOVERNMENT	3
II. TO THE EXTENT THAT CHAPTER 27-19 OF THE NORTH DAKOTA CODE PRECLUDES SUITS IN STATE COURT BY INDIANS AND INDIAN TRIBES, IT UNCONSTITUTIONALLY DENIES THEM EQUAL PROTECTION AND DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT	10
CONCLUSION	13

TABLE OF AUTHORITIES

CASES — Page

Acosta v. *San Diego County*, 272 P.2d 92 (Ca. App. 1954) 12
Arizona v. *San Carlos Apache Tribe*, —— U.S. ——, 51 U.S.L.W. 5095 (July 1, 1983) 6, 11
Begay v. *Miller*, 222 P.2d 624 (Ariz. 1950) 10
Bill Johnson's Restaurants, Inc. v. *N.L.R.B.*, —— U.S. ——, 51 U.S.L.W. 4636 (May 31, 1983) 12
Bradley v. *Arizona Corp. Commission*, 141 P.2d 524 (Ariz. 1943) 12
Brown v. *Anderson*, 160 P. 724 (Okl. 1916) 4
Brown v. *Babbit Ford, Inc.*, 571 P.2d 689 (Ariz. App. 1977) 10
Bryan v. *Itasca County*, 426 U.S. 373 (1976) 3
In re Buehl, 555 P.2d 1334 (Wash. 1976) (en banc) 10
California Motor Transport Co. v. *Trucking Unlimited*, 404 U.S. 508 (1972) 12
Draper v. *United States*, 164 U.S. 240 (1896) 6
Felix v. *Patrick*, 145 U.S. 317 (1892) 3
Fisher v. *District Court*, 424 U.S. 382 (1976) 5
Harrison v. *Laveen*, 196 P.2d 456 (Ariz. 1948) 12
Hot Oil Service, Inc. v. *Hall*, 366 F.2d 295 (9th Cir. 1966) 9
Jicarilla Apache Tribe v. *Andrus*, 687 F.2d 1324 (10th Cir. 1982) 6, 7
Jim v. *CIT Financial Services Corp.*, 533 P.2d 751 (N.M. 1975) 10
Littell v. *Nakai*, 344 F.2d 486 (9th Cir. 1965) 9
Little Thunder v. *South Dakota*, 518 F.2d 1253 (8th Cir. 1975) 12
In re Marriage of Red Fox, 542 P.2d 918 (Or.App. 1975) 10
McClanahan v. *Arizona Tax Commission*, 411 U.S. 164 (1973) 3, 6, 8
McCrea v. *Busch*, 524 P.2d 781 (Mont. 1974) 4
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982) 4, 7

TABLE OF AUTHORITIES—Continued

	Page
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145 (1973)	3
Montana v. *United States*, 450 U.S. 544 (1981)	7
Montana Catholic Missions v. *Missoula County*, 200 U.S. 118 (1906)	6
Montoya v. *Bolack*, 372 P.2d 387 (N.M. 1962)	12
Morton v. *Mancari*, 417 U.S. 535 (1974)	13
Natonabah v. *Board of Education*, 355 F.Supp. 716 (D.N.M. 1973)	12
Paiz v. *Hughes*, 417 P.2d 51 (N.M. 1966)	4
Phillips v. *Reynolds*, 113 N.W. 234 (Neb. 1907)	4
Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 (1968)	3
Poitra v. *Demarrias*, 502 F.2d 23 (8th Cir. 1974)	9
Ramah Navajo School Board, Inc. v. *Bureau of Revenue of New Mexico*, —— U.S. ——, 73 L.Ed.2d 1174 (1982)	3
Rice v. *Rehner*, —— U.S. ——, 51 U.S.L.W. 5141 (July 1, 1983)	5
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 (1978)	4, 10
Three Affiliated Tribes v. *Wold Engineering, P.C.*, 321 N.W.2d 510 (N.D. 1982)	11
United States v. *Candelaria*, 271 U.S. 432 (1926)	3
United States v. *Mazurie*, 419 U.S. 544 (1975)	4
United States v. *McBratney*, 104 U.S. 621 (1882)	6
United States v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940)	6
United States v. *Wheeler*, 435 U.S. 313 (1978)	4
United States ex rel. Mackey v. *Cox*, 59 U.S. (18 How.) 100 (1856)	10
Wagoner v. *Evans*, 170 U.S. 588 (1898)	6
Warren Trading Post v. *Arizona Tax Commission*, 380 U.S. 685 (1965)	6
Washington v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)	7
Washington v. *Yakima Indian Nation*, 439 U.S. 463 (1979)	5, 11, 13
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 (1980)	7

TABLE OF AUTHORITIES—Continued

	Page
In re Whiteshield, 124 N.W.2d 694 (N.D. 1963)	11
Whiting v. *Hoffine*, 294 N.W.2d 921 (S.D. 1980)	4
Williams v. *Lee*, 358 U.S. 217 (1959)	5, 6
Yanito v. *Barber*, 348 F.Supp. 587 (D.Utah 1972) (three-judge court)	12
STATUTES AND REGULATIONS	
Fort Berthold Tribal Code, Chapter 2, Section 1(a)	7
Fort Peck Comprehensive Code of Justice, Chapter 1, Section 107	9
North Dakota Cent. Code, Chapter 27-19	10, 11, 12
Standing Rock Sioux Tribe, Code of Justice, Section 1-107	9
25 C.F.R. 11.1(a)(4)	8
25 C.F.R. 11.1(e)	9
25 C.F.R. 11.22	9
25 U.S.C. 1321, *et seq.*	5, 10
28 U.S.C. 1738	10
42 U.S.C. 1981	12
43 U.S.C. 666	11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-629

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

v.

WOLD ENGINEERING, P.C., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Dakota

---

BRIEF OF STANDING ROCK SIOUX TRIBE, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, AND SHOSHONE TRIBE OF THE WIND RIVER RESERVATION AS *AMICI CURIAE*

INTEREST OF AMICI

Amici are all federally-recognized Indian tribes with established, well-organized tribal governments, including tribal court systems. They have a great interest in this case, since affirmance of the decision below would close state court doors to Indian and Indian tribal plaintiffs. The tribes are interested, both as entities which may require access to state courts, and as governments concerned for the well-being of their members who may need to sue in state courts, in assuring that Indians are not denied access to these courts. They also have an interest in seeing that the proper balance is struck between state jurisdiction and protection of the jurisdiction and

role of the tribal courts. In addition, *amicus* Standing Rock Sioux Tribe, as a North Dakota tribe, has a direct interest in the outcome of this case.

Amici submit this brief to assist the Court in recognizing that the decision of the North Dakota Supreme Court is not required or authorized by federal law, and denies plaintiffs equal protection of the laws.

SUMMARY OF ARGUMENT

The decision of the North Dakota Supreme Court, closing its courts to any suit commenced by an Indian plaintiff against a non-Indian defendant arising out of a transaction on a reservation, is contrary to a uniform and well-established body of law recognizing state court jurisdiction in these limited circumstances, and would often leave tribes and Indians without any forum to resolve such disputes. This Court has held that federal law preempts state courts from exercising jurisdiction over reservation Indians as defendants in cases arising on the reservation, but this federal policy does not foreclose state court jurisdiction over cases where an Indian or Indian tribe has voluntarily petitioned a state court as a plaintiff to resolve a dispute with a non-Indian. Exercise of state court jurisdiction in this case does not interfere with the tribal right of self-government, because—while the Tribes could have conferred jurisdiction upon their tribal court to hear this suit—they choose not do so. Even if the tribal court had had jurisdiction, concurrent state jurisdiction would present no interference with tribal self-government unless a tribal interest required exclusive tribal jurisdiction or a state court declined to give effect to a tribal court judgment in subsequent proceedings to enforce that judgment.

To the extent that state law forbids state court jurisdiction over this case, that law denies Indians equal protection and due process of law. A state may, as a matter of state policy, decline to exercise even that coercive ju-

risdiction over Indian defendants allowed by federal law. However, a state may not deny Indians civil rights and civic benefits it extends to other state citizens. The right to petition a state court to resolve a civil dispute as a voluntary plaintiff is such a civil right, an aspect of the First Amendment right to petition the government for redress of grievances. The unique status of Indian tribes under federal law gives Congress a broad power to enact legislation singling out tribal Indians. However, states have no such unique relationship with Indians and absent clear authorization by Congress, may not deny them basic civil rights and civic benefits.

ARGUMENT

I. STATE COURT JURISDICTION OF THIS CASE DOES NOT INFRINGE ON THE FEDERALLY PROTECTED RIGHT OF INDIANS TO MAKE THEIR OWN LAWS AND BE RULED BY THEM.

Contrary to a well-established and uniform body of law recognizing state court jurisdiction over such cases,[1] the

---

[1] In *Felix* v. *Patrick*, 145 U.S. 317, 332 (1892), this Court already thought that right was clear and settled:

> It is scarcely necessary to say * * * that, while until this time they [the Indian plaintiffs] were not citizens of the United States, capable of suing as such in the Federal courts, the courts of Nebraska were open to them as they were to all persons irrespective of race or color.

The court reaffirmed the fact that state courts were open to Indians in *United States* v. *Candelaria*, 271 U.S. 432, 444-45 (1926), holding that an Indian pueblo could sue in state court to quiet its title to lands alleged to be within the pueblo.

Many important recent Indian cases in this Court began as suits by Indians or Indian tribes in state courts. *E.g.*, *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365 (1968); *McClanahan* v. *Arizona Tax Comm.*, 411 U.S. 164 (1973); *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145 (1973); *Bryan* v. *Itasca County*, 426 U.S. 373 (1976); *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue of New Mexico*, —— U.S. ——, 73 L.Ed.2d 1174 (1982). In none of those cases did this Court suggest that the state courts lacked subject

North Dakota Supreme Court has concluded that its courts are closed to any suit voluntarily commenced by an Indian plaintiff against a non-Indian to resolve a dispute arising out of a transaction on a reservation. In so doing, the court denied to the petitioner the right to sue respondent Wold Engineering in its own court—the state court of its state of residence—the one court where jurisdiction should be unimpeachable. This singular decision, if permitted to stand, would frequently leave tribes and reservation Indians without any forum to adjudicate civil disputes between themselves and non-Indians. That would occur except where (1) a federal court has jurisdiction over the case, or (2) the tribe has authorized its own courts to adjudicate civil suits against non-Indian defendants.

The law concerning Indian reservation jurisdiction has been clarified in recent decades by decisions of this Court. These decisions have uniformly affirmed the essential role of Indian tribes as governmental entities "possessing attributes of sovereignty over both their members and their territory," *United States* v. *Mazurie*, 419 U.S. 544, 557 (1975); *Accord Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982); *United States* v. *Wheeler*, 435 U.S. 313 (1978). And the Court has repeatedly emphasized the special role of tribal courts as "appropriate forums for the exclusive adjudication of disputes affecting important personal and property interests of both Indians and non-Indians." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978) (footnote omitted); *See United States* v. *Wheeler*, 435 U.S. 313, 332 (1978)

---

matter jurisdiction. Before this case, state court decisions also have uniformly allowed suits by Indians against non-Indians. *E.g.*, *Whiting* v. *Hoffine*, 294 N.W. 2d 921, 923-24 (S.D. 1980); *McCrea* v. *Busch*, 524 P.2d 781 (Mont. 1974); *Paiz* v. *Hughes*, 417 P.2d 51 (N.M. 1966); *Brown* v. *Anderson*, 160 P. 724, 726-27 (Okl. 1916); *Phillips* v. *Reynolds*, 113 N.W. 234 (Neb. 1907).

("tribal courts are important mechanisms for protecting significant tribal interests").

In like vein, the Court has invariably held that the federal policy of allowing reservation Indians to "make their own laws and be ruled by them" preempts state courts from exercising *coercive* jurisdiction over reservation Indians in suits brought *against* them by non-Indian plaintiffs concerning reservation transactions.[2] *Williams* v. *Lee*, 358 U.S. 217 (1959). In *Williams*, the Court specifically recognized a federal policy of encouraging "tribal governments and courts to become stronger and more highly organized," *id.* at 220, and held that to allow exercise of state court jurisdiction over a civil suit against an Indian defendant concerning a debt incurred on the reservation would undermine the authority of the tribal courts to adjudicate the dispute, which was clearly within its jurisdiction. *See also Fisher* v. *District Court*, 424 U.S. 382, 387-88 (1976) (state court jurisdiction over an adoption proceeding involving only reservation Indians would "create a substantial risk of conflicting adjudications * * * and would cause a corresponding decline in the authority of the Tribal Court").

While federal law thus precludes making Indians *involuntary* parties to a state court proceeding involving an on-reservation transaction, this policy does not foreclose state court jurisdiction where an Indian tribe or individual has *voluntarily* petitioned a state court as plaintiff to resolve a dispute with a non-Indian. In such a case, no Indian is haled before the state court. No Indian is subjected to rules of conduct or duties created by

---

[2] Of course, states may exercise coercive jurisdiction in situations where Congress has provided for such state jurisdiction. *E.g.*, Public Law 280, 25 U.S.C. 1321 *et seq.* (civil and criminal jurisdiction), see *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979), or 18 U.S.C. 1161 (regulatory jurisdiction over liquor sales), see *Rice* v. *Rehner*, —— U.S. ——, 52 U.S.L.W. 5141 (July 1, 1983).

state law. No Indian is subject to judgment.[3] The *coercive* power of the state is imposed only on the non-Indian defendant, and the power of the state over non-Indians in this context has always been clear. *See Montana Catholic Missions* v. *Missoula County*, 200 U.S. 118 (1906); *Wagoner* v. *Evans*, 170 U.S. 588 (1898); *cf. Draper* v. *United States*, 164 U.S. 240 (1896); *United States* v. *McBratney*, 104 U.S. 621 (1882); *Arizona* v. *San Carlos Apache Tribe*, —— U.S. ——, 51 U.S.L.W. 5095, 5099-5100 (July 1, 1983). For these reasons, this Court has always made it clear in cases denying state courts and regulatory agencies coercive jurisdiction over tribal Indians engaged in reservation transactions that state courts *do* have jurisdiction to adjudicate controversies between Indians and non-Indians that are voluntarily submitted to them by the Indian party to the transaction. *E.g.*, *McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 171-173 (1973); *Williams* v. *Lee*, 358 U.S. 217, 219-220 (1959); *See Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685, 687 n.3 (1965).

This general principle remains a sound rule of law: state courts should exercise jurisdiction over such cases except where state court adjudication is "preempted by federal law"[4] or would interfere with the federally-

---

[3] *Williams* v. *Lee*, *supra*, would presumably bar affirmative relief against an Indian plaintiff on a counterclaim larger than or not related to the plaintiff's claim. That issue is not presented in this case, although a counterclaim was asserted, because the counterclaim was much smaller than the main claim, and thus was in the nature of a set off. In any event, when plaintiff is an Indian tribe, as opposed to an individual, counterclaims in excess of the plaintiff's claim are barred by tribal sovereign immunity. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1344-45 (10th Cir. 1982).

[4] The United States and petitioner have demonstrated in their briefs there is no preemption here. We agree that the reliance of the North Dakota Supreme Court on "Public Law 280," 25 U.S.C. 1321 *et seq.*, as authority for the denial of state court jurisdiction is misplaced.

protected right of reservation Indians to "make their own laws and be ruled by them." *E.g.*, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980).

Exercise of state court jurisdiction over the present case could not possibly interfere with the federal policy of allowing Indians to exercise tribal self-government on the Fort Berthold Reservation. In this case, the *Tribes themselves* commenced the suit in state court. More importantly, at the time this suit was filed, the Fort Berthold Tribal Court was not authorized by the Tribes to exercise coerceive civil jurisdiction over non-consenting, non-Indian defendants.[5] Consequently, state jurisdiction could not conceivably interfere with the functioning of the tribal court or with any tribal policy.[6]

---

[5] Fort Berthold Tribal Code, Chapter 2, Section 1(a), quoted in the petition for certiorari. According to the brief of the United States as amicus curiae in support of the petition for certiorari, the code was, subsequent to the North Dakota Supreme Court's decision in this case, amended to extend the court's jurisdiction.

[6] The Tribes could clearly have conferred jurisdiction on their tribal court to adjudicate controversies between themselves and non-Indians transacting business on the Reservation.

Civil jurisdiction of tribes over non-Indians was upheld in *Washington* v. *Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), where this Court held that an Indian tribe could tax non-Indian purchasers of cigarettes on the reservation. The Court emphasized that the executive branch had "consistently recognized that Indian tribes possess a broad measure of civil jurisdiction over the activities of non-Indians on Indian reservation lands in which the tribes have a significant interest." *Id.* at 152. The *Colville* case, and jurisdiction of Indian tribes to tax non-Indian activities on reservation trust lands, were reaffirmed in *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130 (1982). There, the Court rejected an argument that taxing power was dependent on the power to exclude non-Indians from trust lands, describing it as "an essential attribute of Indian sovereignty" and "a necessary instrument of self-government and territorial management." *Id.* at 137.

Even *Montana* v. *United States*, 450 U.S. 544 (1981), which overturned a tribal ordinance regulating hunting and fishing by non-Indians on fee land within a reservation, reaffirmed substantial

Many tribes, like the Fort Berthold tribes and most tribes which have Courts of Indian Offenses—including *amici* Shoshone Tribe [7]—have chosen not to confer jurisdiction on their tribal courts to resolve civil disputes between Indian plaintiffs and non-consenting, non-Indian defendants.[8] This is an appropriate tribal policy. For while federal law encourages the development of tribal courts and other governmental institutions, it does not *require* tribes to assert tribal court jurisdiction to the fullest extent allowed by law. Indeed, the Bureau of Indian Affairs has not allowed the exercise of jurisdiction in cases like this by Courts of Indian Offenses maintained by it on Indian reservations.[9] Where tribal courts do

---

tribal jurisdiction over non-Indian activities. There, the Court stated that tribes may regulate non-Indian activities on trust land, *id.* at 557, and in some circumstances, even on reservation fee land, *id.* at 566, and that a "tribe may regulate, through taxation, licensing *or other means*, the activities of non members who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases or other arrangements." *Id.* at 565 (emphasis added).

The above cases are all tax or regulatory cases, but their reasoning and their language compel the conclusion that the Tribes can assert civil jurisdiction over private causes of action between Indian plaintiffs and non-Indian defendants which arise on the reservation or out of consensual relationships with Indians. *See McClanahan* v. *Arizona Tax Commission*, 411 U.S. 164, 178 (1978) (suggesting that civil or criminal jurisdiction is a necessary condition to imposing and collecting a tax).

[7] See 25 C.F.R. 11.1(a)(4).

[8] Other tribes, while granting jurisdiction over such cases, have chosen not to adopt a "long arm" jurisdictional ordinance. In that case a non-Indian could not be sued in tribal court unless he could be served on the reservation.

[9] "The Court of Indian Offenses shall have jurisdiction of all suits wherein the defendant is a member of the tribe or tribes within their jurisdiction, and of all other suits between members

not exercise jurisdiction over cases with involuntary non-Indian defendants, there is no possible collision between state court jurisdiction to adjudicate such cases and tribal powers of self-government. And unless a federal court should have diversity [10] or federal question jurisdiction over the case, *no court* could resolve the dispute in these circumstances if the decision below is allowed to stand.

Other tribes, such as *amici* Standing Rock Sioux Tribe and the Assiniboine and Sioux Tribes of the Fort Peck Reservation, have authorized their tribal courts to exercise jurisdiction where one party to the action is an Indian or a tribally or Indian owned business and the transaction or occurrence giving rise to the cause of action arises on the reservation or under tribal law.[11] In such circumstances, the tribal court would provide a forum to resolve disputes like the present case. Even here, however, *amici* submit that the exercise of concurrent state court jurisdiction over a case brought by an Indian plaintiff would not necessarily interfere with the federal policy of tribal self-government. Infringement on the right of reservation Indians to exercise powers of self-government would occur only if a tribal interest required *exclusive* tribal court jurisdiction over a particular kind of reservation dispute between Indians and

---

and nonmembers which are brought before the courts by stipulation of both parties." 25 C.F.R. 11.22.

A tribe which has a Court of Indian Offenses may alter its jurisdiction by tribal ordinance. *See* 25 C.F.R. 11.1(e). *Amici* Shoshone Tribe has not altered the jurisdiction of the Court of Indian Offenses at the Wind River Reservation.

[10] Indeed, since a federal court exercising diversity jurisdiction sits as a court of the state, it is doubtful that a federal court could take jurisdiction over a case merely because of diversity of citizenship where a state court would not. *Hot Oil Service, Inc.* v. *Hall*, 366 F.2d 295 (9th Cir. 1966); *Littell* v. *Nakai*, 344 F.2d 486 (9th Cir. 1965); *but see Poitra* v. *Demarrias*, 502 F.2d 23 (8th Cir. 1974).

[11] Standing Rock Sioux Tribe, Code of Justice, Section 1-107; Fort Peck Comprehensive Code of Justice, Chapter 1, Section 107.

non-Indians, and where a suit were nonetheless brought in state court. Similarly, tribal governmental processes might be infringed if a tribal court exercised jurisdiction properly conferred on it to adjudicate a controversy and a state court thereafter declined to apply ordinary rules of comity[12] in a subsequent proceeding brought to enforce that judgment.

II. TO THE EXTENT THAT CHAPTER 27-19 OF THE NORTH DAKOTA CODE PRECLUDES SUITS IN STATE COURT BY INDIANS AND INDIAN TRIBES, IT UNCONSTITUTIONALLY DENIES THEM EQUAL PROTECTION AND DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

The Supreme Court of North Dakota relied heavily on a state statute implementing Public Law 280, 25 U.S.C. 1321 *et seq.*—North Dakota Cent. Code, Chapter 27-19—in concluding that the state courts did not have jurisdiction over this case.[13] If it is construed to deny Indian

---

[12] *E.g., In re Marriage of Red Fox*, 542 F.2d 918, 920 (Or. App. 1975); *Begay* v. *Miller*, 222 P.2d 624, 628 (Ariz. 1950); *see Brown* v. *Babbitt Ford, Inc.*, 571 P.2d 689 (Ariz. App. 1977). Tribal courts have been regarded as the courts of "territories" for the purpose of provisions like 28 U.S.C. 1738, which provides that:

> The records and judicial proceedings of any court of any * * * state, territory or possession * * * shall have the same full faith and credit in every court within the United States and its territories and possessions as they have by law or usage in the courts of such state, territory or possession from which they are taken.

E.g., United States, ex rel. Mackey v. *Cox*, 59 U.S. (18 How.) 100, 104 (1856); *Jim* v. *CIT Financial Services Corp.*, 533 P.2d 751 (N.M. 1975); *In re Buehl*, 555 P.2d 1334, 1342-43 (Wa. 1976) (en banc); *See Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65, n.21 (1978).

[13] The court stated that petitioners' "argument would be more convincing had the legislature of North Dakota not * * * totally disclaimed jurisdiction over civil causes of action arising on an

citizens of North Dakota voluntary access to state courts, the statute unconstitutionally denies them equal protection and due process of law.

A state may, as a matter of state law, decline to exercise coercive jurisdiction over Indians, even where such jurisdiction is allowed under federal law. For example, a state may decline to exercise jurisdiction under Public Law 280, or may exercise it selectively.[14] Similarly, notwithstanding the McCarran Amendment, 43 U.S.C. 666, a state could, as a matter of state policy, decline to adjudicate Indian reserved water rights in state courts. *See Arizona* v. *San Carlos Apache Tribe*, —— U.S. ——, 51 U.S.L.W. 5095, 5099 (July 1, 1983). In either event, a state would be giving effect to a permissible state policy of resisting incursions into tribal self-government and affairs to an even greater extent than is *required* by *federal* law.

However, a state may not deny Indians, including those retaining tribal affiliations, benefits it extends to other state citizens in a manner that denies equal protection or due process of law. Thus, Indians are constitutionally

---

Indian reservation." *Three Affiliated Tribes* v. *Wold Engineering, P.C.*, 321 N.W.2d 510, 511 (N.D. 1982). The court also relied upon *In re Whiteshield*, 124 N.W. 2d 694 (N.D. 1963) where it had said:

> [B]y the amendment of Section 203 of the North Dakota Constitution in 1958, and the passage of Chapter 242 of the Session Laws of 1963 [North Dakota Cent. Code, Chapter 27-19], the people and the legislature of the State have taken affirmative action which amounts to a complete disclaimer of jurisdiction over civil causes of action which arise on an Indian reservation, except upon acceptance by the Indian citizens of the reservation * * *.

Three Affiliated Tribes, supra at 512, quoting *In re Whiteshield, supra*, at 696.

[14] *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979). Even the mandatory states under P.L. 280 were consulted prior to inclusion in that statute. *Id.* at 497.

entitled to vote in state elections,[15] to run for and hold state office,[16] and to receive public services and benefits.[17]

In the same vein, the right to petition a state court to resolve a civil dispute as a voluntary plaintiff cannot be denied to tribal Indian citizens by the state. Indeed, the right of access to courts is a civil right specifically protected by 42 U.S.C. 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, *to sue, be parties*, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens * * * (emphasis added)

In construing Chapter 27-19 to deny this right to Indians, the North Dakota Supreme Court goes beyond permissible state protection of Indian self-government, and denies Indians and Indian tribes equal protection and due process. By the decision below, North Dakota is not simply refusing to exercise coercive state court jurisdiction over Indians, it is denying them *access* to its courts—an aspect of the First Amendment right to petition the government for redress of grievances[18] which Indians share with all other citizens of the state.[19]

---

[15] *E.g.*, *Montoya* v. *Bolack*, 372 P.2d 387 (N.M. 1962); *Harrison* v. *Laveen*, 196 P.2d 456 (Ariz. 1948); *see Little Thunder* v. *South Dakota*, 518 F.2d 1253 (8th Cir. 1975).

[16] *E.g.*, *Yanito* v. *Barber*, 348 F.Supp. 587 (D. Utah, 1972) (three-judge court).

[17] *E.g.*, *Natonabah* v. *Board of Education*, 355 F. Supp. 716 (D.N.M. 1973) (public schools); *Acosta* v. *San Diego County*, 272 P.2d 92 (Ca. App. 1954) (welfare); *Bradley* v. *Arizona Corp. Commission*, 141 P.2d 524 (Ariz. 1943) (business license).

[18] *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510 (1972); *Bill Johnson's Restaurants, Inc.* v. *National Labor Relations Board*, —— U.S. ——, 51 U.S.L.W. 4636 (May 31, 1983).

[19] As noted *supra*, page 6, there is no doubt North Dakota would have jurisdiction over actions between non-Indians arising

The unique status of Indian tribes under federal law gives to Congress broad power to enact legislation singling out tribal Indians. *See Morton* v. *Mancari*, 417 U.S. 535, 551-53 (1974). But "States do not enjoy this same unique relationship with Indians," *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 501 (1979). Thus, absent clear authorization by Congress, discrimination in *state* laws that denies civil rights and civic benefits to Indians violates the equal protection and due process clauses.

CONCLUSION

The decision of the Supreme Court of North Dakota should be reversed and the case remanded for further proceedings.

Respectfully submitted,

REID PEYTON CHAMBERS *
KEVIN A. GRIFFIN
SONOSKY, CHAMBERS, SACHSE & GUIDO
1050 31st Street, N.W.
Washington, D.C. 20007
(202) 342-9131

Counsel for Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes of the Fort Peck Reservation and Shoshone Tribe of the Wind River Reservation

* Counsel of Record

---

on an Indian reservation. Only plaintiff's status as an Indian tribe distinguishes this case.

Office-Supreme Court, U.S.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-629

In the Supreme Court of the United States

October Term, 1982

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., AND SCHMIDT, SMITH & RUSH, P.C.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

OBJECTION OF RESPONDENT, WOLD ENGINEERING TO MOTION FOR LEAVE TO FILE BRIEF OF STANDING ROCK SIOUX TRIBE, ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK RESERVATION, AND SHOSHONE TRIBE OF THE WIND RIVER RESERVATION AS AMICUS CURIAE

HUGH MCCUTCHEON
(Counsel of Record)
BOSARD, MCCUTCHEON & RAU, LTD.
200 Heritage Place
P.O. Box 939
Minot, North Dakota 58702-0939
Counsel for Respondent, Wold Engineering, P.C

August, 1983

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3080

I. QUESTIONS PRESENTED

1. Whether Amicus briefs should be filed if the interests and position advanced by the amicus will not aid the court in reaching resolution of the issue presented.
2. Whether an Indian tribe has standing to object to the jurisdictional consequences the tribe created for itself.

II. PARTIES TO THE PROCEEDINGS

1. Three Affiliated Tribes of the Fort Berthold Reservation, Petitioners.
2. Wold Engineering, P.C.; and Schmidt, Smith & Rush, P.C., Respondents.
3. The United States of America; Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes of the Fort Peck Reservation, and Shoshone Tribe of the Wind River Reservation; and Turtle Mountain Chippewa Tribe, and Native American Rights Fund, as Amicus Curiae.

III. TABLE OF CONTENTS

I. Questions Presented I

II. Parties to the Proceedings II

III. Table of Contents III

IV. Table of Authorities IV

V. Jurisdictional Statement 1

VI. Statement of the Case 1

VII. Summary of the Argument 1

VIII. Argument—

A. If an amicus brief will not aid the Court in reaching a decision on the questions presented in the case, the filing of the amicus brief is a useless act, and permission to file the same should be denied 2

B. An amicus has no standing to object to the jurisdictional consequences the amicus created for itself 5

IX. Conclusion 7

IV. TABLE OF AUTHORITIES

DiFrischia v. New York Central Railway, 279 F.2d 141 (3rd Cir. 1960) 5

International Shoe v. Washington, 326 U.S. 310 (1945) 5

Lee v. United States, 343 U.S. 924 (1952) 3

United States v. Antelope, 430 U.S. 641 (1977) 5

Public Law 280, Chapter 505 U.S. Statutes at Large 67, §6 ..... 5, 6

Rule 36.3, United States Supreme Court Rules 1, 2, 3

Chapter 27-19, NDCC 5

Section 27-19-02, NDCC 6

North Dakota, Legislative History 1963, Chapter 27-19, NDCC 6

V. JURISDICTIONAL STATEMENT

Standing Rock files this Motion pursuant to Rule 36.3, United States Supreme Court Rules, for leave to file a brief as amicus curiae. Wold respectfully submits this reply brief.

VI. STATEMENT OF THE CASE

On May 26, 1983, Standing Rock Sioux Tribe, and other Indian tribes, hereafter referred to as "Standing Rock", requested permission from Wold Engineering to file a brief as amicus curiae in support of Petitioner. Respondent, Wold Engineering, hereafter referred to as "Wold", asked Standing Rock to justify to Wold its reasons for filing. Standing Rock submitted to Wold a statement that its tribal members would be affected by the Supreme Court's decision in this case. Further, Standing Rock submitted that as a matter of professional courtesy permission to file amicus briefs is freely given. Wold determined that the reasons stated by Standing Rock were insufficient to justify the filing of amicus briefs and therefore withheld its consent.

Standing Rock now makes its Motion, and has filed a supporting brief for permission of this Court to file. Wold objects to this Motion.

VII. SUMMARY OF THE ARGUMENT

The law does not suffer the performance of useless acts. An amicus curiae, and all parties should strive to limit the filing of briefs and other papers to those briefs and papers which will aid the Court in the determination of issues. If an amicus cannot satisfy this standard, and adds no new insights into the decision making process, the

brief should not be filed. Leave to file a brief which does not advance the determination of issues should not be granted.

Neither a party, nor amicus, may object to the consequences it created as a result of its own actions. When statements and representations are made, and those statements cause others to act in reliance thereon, the party making those statements and representations may not object to the consequences which flow therefrom. Fair play and tradition dictate that persons live within the legal conditions their actions have created. Leave to file a brief which objects to the consequences an amicus's own actions have created should not be granted.

VIII. ARGUMENT

A. If an amicus curiae brief will not aid the Court in reaching a decision on the questions presented in the case, the filing of an amicus brief is a useless act, and permission to file should be denied.

Rule 36.3, United States Supreme Court Rules, requires a person seeking permission to file a brief as amicus curiae show this Court the nature of the applicant's interests; the facts and questions of law that have not been, or reasons for believing they will not be, adequately presented by the parties; and the relevancy of those facts to the case. When Standing Rock first asked Wold's permission to file as amicus, Wold asked Standing Rock to justify, under Rule 36.3 standards, its role as amicus. Standing Rock replied to this query by stating that as an Indian tribe the decision in this case would affect it; that it had an interest in the outcome of the decision; and that as a matter of professional courtesy permission to file an amicus brief is normally granted.

Rule 36.3 contemplates that an amicus show to the Court concrete justification. Further, in his Memorandum Opinion in *Lee v. United States*, 343 U.S. 924 (1952) Justice Frankfurter wrote that amicus briefs should aid the Court in reaching its decision, and parties should consent to the amicus *if that aid is presented.*

When this Court speaks everyone, Indian and non-Indian alike, is immediately and significantly affected; this is the sole claim Standing Rock has asserted as its interest in this case. Wold asserted this is not justification for the filing of an amicus brief, and Wold therefore denied its permission to Standing Rock to file. In its Motion before this Court, Standing Rock has presented no justification.

Standing Rock has shown in its Motion no specific question or interest outside those presented by Three Affiliated Tribes. Its argument in the brief itself does not offer any resolution of issues not already argued in the brief of Three Affiliated Tribes.

Standing Rock claims that the decision of the North Dakota Court, if affirmed, may close the doors of the North Dakota Courts to tribal members and the tribe. (Motion of Amicus.) That interest is congruent to the interest of Three Tribes, and presents nothing new to this case.

In short, the brief of Standing Rock will not aid the Court and is but a useless act. It has not justified its filing of a brief under the rules; it has not met the requirements of the rules. Permission to file the brief as amicus should be denied.

Professional courtesy should not be the justification for proliferation of paper, and unjustifiable filing of briefs. Actions which will not advance the purpose and intent of the rules adopted by this Court should be prohibited.

Standing Rock ingeniously seeks to invent an issue which will not be addressed by all parties claiming "coercive jurisdiction" of the State Courts, particularly in regard to Wold's counterclaim against Three Tribes. (Brief of Amicus, pp. 5-10.) The position argued by Standing Rock is not consistent with Three Tribes's argument in the State Court. There, Three Tribes argued that the State Court could not assume jurisdiction over the counterclaim, but rather, Wold would be required to take its counterclaim to the Tribal Court. This position was flatly and justifiably quashed by the North Dakota Supreme Court during oral argument. (The tape of this proceeding is available in the Clerk of the North Dakota Supreme Court's office.)

Further, Standing Rock argues that due to the size and nature of the two claims, that no "coercive jurisdiction" can be asserted since if Wold is successful, its counterclaim would only amount to a setoff against Three Tribes's claim. (Brief of Amicus, p. 6, footnote 3.) This argument was also presented to the North Dakota Court and was rejected by that Court.

This argument is highly presumptuous and entirely without merit. Counsel for Wold does not pretend to be omniscient, and professes to having but limited experience in this world and certainly none in the next. However, even in that limited experience it is recalled that on at least one occasion a plaintiff lost absolutely on its case in chief, while at the same time a defendant prevailed entirely on its counterclaim. If Three Tribes fails in its efforts, and if Wold is successful, the jurisdiction of the North Dakota Supreme Court will be every bit as coercive as if Wold had taken upon itself to initiate the action. Surely the argument of Standing Rock will admit to this possibility, and once so admitting should be disregarded by the Court.

B. An amicus has no standing to object to the jurisdictional consequences the amicus created for itself.

The Constitution envisions legal proceedings to be conducted so as to guarantee fair play and substantial justice. *International Shoe v. Washington*, 326 U.S. 310 (1945). The Constitution will not authorize gamesmanship, nor may a party justly play fast and loose with the judicial machinery. *U.S. v. Antelope*, 430 U.S. 641 (1977) (footnote 13); *DiFrischia v. New York Central Railway*, 279 F.2d 141 (3rd Cir. 1960). These statements are representative of the fundamental and traditional notions of justice expressed by this and other courts.

Standing Rock seeks to object to the holding of the North Dakota Court, and places an argument before this Court on the issues. The consequences of the North Dakota Supreme Court ruling are the result of Standing Rock's own making. For Standing Rock to now complain of the consequences it created would work to pervert those notions of evenhanded play suggested above.

After the passage of P.L. 280, North Dakota, a disclaimer state, was required to amend its constitution and pass affirmative legislation before assuming any subject matter jurisdiction. P.L. 280, Chapter 505 U.S. Statutes at Large 67, §6. Since the North Dakota legislature meets only once every two years, some time passed between passage of P.L. 280 and North Dakota state action. That action took place in 1958 and 1963. In 1963 the legislature enacted Chapter 27-19, NDCC. Prior to passage of that law, committee meetings were held. On January 21, 1963, a joint committee meeting of the State House and Senate State and Federal Government Committee met in Bismarck, North Dakota. Attending that meeting, and speaking on behalf of Standing Rock was Marvin Sonosky, their attorney. (Wold believes this Marvin Sonosky to be the same

Marvin Sonosky who is a member of the firm which represents Standing Rock today.) In speaking to that committee, Mr. Sonosky stated the bill proposed by North Dakota violated P.L. 280, and the morals of law. He told the North Dakota committee that jurisdiction under P.L. 280 was an all, or nothing at all proposition, and before North Dakota undertook to assume jurisdiction in Indian country the Indians affected should be allowed to vote on the issue. North Dakota Legislative History 1963, Chapter 27-19, NDCC. (Copies of this History are attached.)

The North Dakota legislature listened to Mr. Sonosky's recommendations and amended the proposed legislation giving Indians a voice in their own destiny. §27-19-02, NDCC. While the Indians, and specifically Standing Rock, asked for this protection not one tribe, and certainly not Standing Rock, has voiced its consent to state jurisdiction. Having asked for the consent provisions, and failing to then act accordingly, Standing Rock brought the consequences of the North Dakota decision upon itself. Standing Rock can hardly complain of those consequences now.

Standing Rock, through its attorney, Marvin Sonosky, told the North Dakota legislative committee that subject matter jurisdiction in Indian country was an all or nothing at all proposition. If this was a misconception in 1963, it was a misconception created by Standing Rock and its attorney. That the North Dakota Supreme Court relied upon this misconception created by Standing Rock and held that the State of North Dakota had no subject matter jurisdiction is an entirely foreseeable consequence. It is also a consequence of Standing Rock's own making. For Standing Rock to now petition this Court for permission to refute a line of North Dakota cases Standing Rock is arguably responsible for creating shows an inconsistency of reasoning and unfairly prejudices all non-Indian North Dakota residents who relied upon the conception.

Standing Rock has engaged in gamesmanship by its request for permission to this Court to join as amicus. Standing Rock, having created a rule of play which the North Dakota Courts adopted and followed for 20 years, now seeks to play fast and loose with that rule. This gamesmanship should not be allowed and Standing Rock's request for permission to join as amicus ought not be allowed.

IX. CONCLUSION

Standing Rock has presented no new insights or facts in this case. The briefs of the parties and Solicitor General will clearly allow this Court to examine all relevant issues in this controversy. The filing of Standing Rock's amicus is, therefore, a useless act and ought to be prohibited.

Standing Rock has created a jurisdictional consequence. These consequences flow from the statements and representations it made to the North Dakota legislature 20 years ago. The Courts of North Dakota have relied upon these representations and acted accordingly. Standing Rock has taken no action to correct any consequences, or to work with the State of North Dakota to rectify these problems. Standing Rock may not now be heard to object to the consequences it caused.

Permission to file a brief as amicus curiae should be denied.

Respectfully submitted this 11th day of August, 1983

BOSARD, MCCUTCHEON & RAU, LTD.
200 Heritage Place
P.O. Box 939
Minot, North Dakota 58702-0939
Attorneys for Wold Engineering

By: HUGH MCCUTCHEON

APPENDIX

MINUTES OF THE JOINT COMMITTEE MEETING OF THE STATE HOUSE AND SENATE STATE AND FEDERAL GOVERNMENT COMMITTEE, JANUARY 21, 1963

A Joint Committee meeting of the House and Senate met today Monday, January 21st, 9:00 A.M. in the hearing room to hear opposition to SB30. Regarding an act accepting Civil jurisdiction over civil causes of action arising in Indian country and providing limitations thereon.

Roll called and a quorum was present in both House and Senate.

Mr. Clif Jockim read part 3 of the jurisdiction as layed out by Civil Law with regard to the Indian and his problems.

Sen Longmire opened hearing in opposition to SB30.

Marvin Sonoski, Attorney, 1700 K Street, Washington, D.C. represented the Standing Rock Indians, the Sioux tribe. He feels this bill would only extend rights of the State Civil jurisdiction. Said merchants wanted this bill so that they could collect deliquent debts. It violates morals of law. It would only cover civil and not criminal jurisdiction. Indians do not want bill passed. State should not have jurisdiction on reservations without Indians consent. If it had the clause of Indian Consent the Indians would be for it. Mr. Sonosky doubted the validity of the bill since it was for only 4 years. Public Law 280 of Congress states Civil and Criminal jurisdiction All or nothing at all. Said the Federal Gov't would probably step out of Indian Affairs if States are to take over and

wondered if the State can give the same schools, roads, education and care. Mr. Sonoski wants the Indian to be able to vote on this bill by ballot.

Sen. Longmire answered Mr. Sonoski, said the merchants were not involved in bill and that the LRC made the study with the help of the Tribes. It would not result in Federal Gov't pulling out of Indian Affairs. Other States that have law notice no lessening of Federal Gov't help.

Rep. Leahy asked how many other States have this jurisdiction? If this law would supercede other civil jurisdiction?

Mr. Sonoski answered 7 States, and yes this law superceded any other.

Mr. Sonoski said Standing Rock getting housing from Federal Gov't under SB30 they would not have status to apply for public housing. and said there was no public housing in N.D.

Emerson Murray LPC, said N. D. has had public housing since 1937. There was some in his own county of Rolette.

Sen. Reichert, How are domestic relations taken care of now?

Mr. Sonoski said State takes over now. Little if any Federal care

Kenneth Moxness, Ambross, N. D. Teacher said he felt this was a good bill. Sen Longmier stated that this hearing was for opposition but thanked him anyway.

Theadore Jamerson, Tribal officer of Standing Rock at Ft. Yates spoke for the tribe against SB30. Had a statement which he spoke from and then presented to the committee. Said Mr. Onsrude deceased, did much

to help Indians. He said the Indians at Standing Rock have their own tribal law whichcovers education, vocational placement and domestic relations. Said Indians want self respect free from Gov't control. Produced a progress report done on there own initative. Said Standing Rock courts far superior to County courts. Need for more reciprical agreement between State, Federal and Tribal law. Said they have had this tribal law since 1958 and it is working better than any other system. The Indians want to get away from Welfare and are becoming independent.

Rep. Gackle, Asked Jamerson if the Indians would want the $65,000. to be appropriated to them for vocational training.

Mr. Jamerson said no, the Indians did not need this help now as they had a livestock program and other way to make money.

Sen. Longmier asked if the tribes wern't at the LRC hearings.

Mr. Jamerson said at the 1962 meeting only 15 present and they met with county and Indians only on law and order. Nothing else mentioned.

Rep. Gackle, complimented Jamerson on wanted to stand on there own two feet but feels that it would hinder them not to accept Federal or State aid.

Ruben Carlson, Child welfare supervisor, Welfare Board, N.D. Stated that Standing Rock had no provisions for neglected children in their Tribal law. Mr. Jamerson said that they do now.

Rep. Reiten; asked who is going to pay for program for homeless children? Jamerson said Federal funds. Mr. Carlson said in July 1962, 149 Indian children in foster

homes. Now there is no means or jursidiction to find homes off the reservation.

Sen. Longmire asked if Indians want aid given to them from N. D.

Mr. Sonoski said Indian pay taxes now and are entitled to these aids.

Emerson Murry said State and Federal uncertain to their jursidiction with regard to welfare.

Robert Lumberg, Attorney, Child Welfare Asked Sonoski if their code had provision for prental rights. Sonoski said jursidiction with the State.

Rep. Welder, asked what is population on Standing Rock reservation?

Mr. Jamerson said 7010, Turtle Rock 6000.

Les Ovre, Director Social Welfare, who pays for children in foster homes. If child is placed offof reservation difficult for State to intervene, or procede with tribal action.

Mr. Jamerson said Federal Gov't pays. also, his tribe fixing up old home to accomodate 25-30 children

Mr. Francis Cree, Turtle Rock Tribal Chairman, Belcourt, N.D. His tribe rejects civil jurisdictionbecause Indians not asked if they were for this. Their code is open for amendments and would like to work with the state.

Jefferson B. Smith, Jr., Ft. Berthoud reservation. Appearing on his own. Said U. S. expencts to much of Indians. Said in 1870 U.S. took away land more in 1880 then Garrison Res. more taken from Indian. All Indians skeptical of whites. They oppose SB30 It was not interperted to Indian and they want it explained to them. Said we acted Imperialisticly.

Richard Cavanaugh, St Michles Mission, Ft Totten in opposition. Carl Whitman, Attorney Ft. Berthoud tribal member. General consences on civil jurisdiction opposed. Said North Dakota makes same mistake as Federal Gov't. by not spending more than a few hours on reservation, should spend at least week, to see how Indian really lives. Indian not ready for Civil Jurisdiction. Garrison Dam project upset Indian badly economically and socially. Said 3/4 of reservation now used by non-Indian.

Sen. Wartner wondered if original treaty being avergated. If Indians are ready to govern selves.

Mr. Sonoski said yes treaty avergated. Initially Indian had jursidiction over whole territory and non-Indian. SB30 attacks Sovereign rights.

Rev. Case, State man for Indian reservation said we cannot generalize this blanket bill for all tribes. Each one Sovereign. Can make progress one tribe at a time.

Sen Longmier asked Mr. Sonoski if the Indians would want an election on the reservation to approve or respect SB30.

Mr. Sonoski said yes, It should be explained to them (the Indians).

All Indians at the hearing agreed this the democratic way.

Sen Longmier adjourned hearing.

Respectfully submitted Joyce Rouse, Secretary

MOTION FILED
JUL 1 1983

No. 82-629

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, Petitioner,

v.

WOLD ENGINEERING, P.C., and SCHMIDT, SMITH & RUSH, Respondents.

On Certiorari to the Supreme Court of North Dakota

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

Kim Jerome Gottschalk*
Richard B. Collins
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Amicus Curiae

*Counsel of Record

July 1983

TABLE OF CONTENTS

PAGE(s)

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES iii

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE..... ix

QUESTIONS PRESENTED..... 1

INTEREST OF AMICUS..... 2

STATUTES INVOLVED..... 3

STATEMENT OF THE CASE..... 3

SUMMARY OF ARGUMENT..... 10

ARGUMENT..... 10

I. FEDERAL LAW DOES NOT AUTHORIZE OR REQUIRE NORTH DAKOTA TO DENY ITS COURTS JURISDICTION OVER CIVIL ACTIONS ARISING IN INDIAN COUNTRY BY INDIANS OR TRIBES AGAINST NON-INDIAN RESIDENTS OF THE STATE..... 10

A. The Decision Below Was Based on Federal Law..... 11

B. This Court's Decisions on Indian Country Jurisdiction Do Not Support The Decision Below..... 17

C. Public Law 280 Does Not Support The Decision Below..25

D. The State's Statute Did Not Comply With P.L. 280.. 33

1. By Its Terms, Public Law 280 Is Confined to Assumption of State Jurisdiction; It Does Not Authorize Withdrawal of Pre-Existing Jurisdiction..... 25

2. The Legislative History and This Court's Decisions Show That Public Law 280 Was Concerned Only with the Assumption of Jurisdiction, Not with Withdrawal of Pre-Existing Jurisdiction..... 29

II. NORTH DAKOTA'S DENIAL OF JURISDICTION OVER THIS ACTION VIOLATES 42 U.S.C. § 1981 AND THE FOURTEENTH AMENDMENT..... 40

A. The State's Action Violates 42 U.S.C. § 1981..... 40

B. The State's Action Violates the Fourteenth Amendment..... 41

1. North Dakota's Rule Denies Indians and Tribes Equal Protection..... 41

2. North Dakota's Rule Denies Indians and Tribes Due Process of Law 45

CONCLUSION 46

TABLE OF AUTHORITIES

CASES	PAGE(s)
Alaska Chapter Associated General Contr. v. Pierce, 694 F.2d 1162 (9th Cir. 1982).....	41
Baldwin v. Montana Fish and Game Comm'n., 436 U.S. 371 (1978).....	44
Boddie v. Connecticut, 401 U.S. 371 (1971).....	46
Bonnett v. Seekins, 126 Mont. 24, 243 P.2d 317 (1952).....	15
Bryan v. Itasca County, 426 U.S. 373 (1976).....	24,29,30,37
Central Machinery Co. v. Arizona Tax Comm'n., 448 U.S. 160 (1980)...	23
City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972).....	4
Cornfield v. Coryell, 6 F.Cas. 546 (C.C.E.D. Pa. 1825) (No. 3230).....	44
Douglas v. California, 372 U.S. 353 (1963).....	43
Felix v. Patrick, 145 U.S. 317 (1892).....	20
Fisher v. District Court, 424 U.S. 382 (1976).....	37
Gourneau v. Smith, 207 N.W. 2d 256 (N.D. 1973).....	15

Griffin v. Illinois, 351 U.S. 12 (1956)..... 44

In re Whiteshield, 124 N.W. 2d 694 (N.D. 1963)..... 14

Kennerly v. District Court, 400 U.S. 423 (1971)..... 36,37,39

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)..... 44,46

Little v. Streater, 452 U.S. 1 (1981)..... 46

Martinez v. Fox Valley Bus Lines, Inc., 17 F.Supp. 576 (N.D. Ill. 1936)..... 41

McClanahan v. Arizona State Tax Comm'n., 411 U.S. 164 (1973)..... 24,37

McCrea v. Busch, 164 Mont. 442, 524 P.2d 781 (1974)..... 22

Moe v. Salish & Kootenai Tribes, 425 U.S. 463 (1976)..... 24

Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906)..... 20

Nelson v. DuBois, 232 N.W. 2d 54 (N.D. 1975)..... 16

Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968)..... 24

Paiz v. Hughes, 76 N.M. 562, 417 P.2d 51 (1966)..... 22,38

Ramah Navajo School Bd. of New Mexico Bureau of Revenue, 102 S.Ct. 3394 (1982)..... 23

Red Hawk v. Joines, 129 Or. 620, 278 P 572 (1929)..... 22

Rolette County v. Eltogbi, 221 N.W. 2d 645 (N.D. 1974)..... 15

United States Dept. of Agriculture v. Moreno, 413 U.S. 528 (1973)..... 45

United States v. Candelaria, 271 U.S. 432 (1926)..... 20,21,23

United States v. McBratney, 104 U.S. 621 (1881)..... 19

United States v. Sandoval, 231 U.S. 28 (1913)..... 21

Vermillion v. Spotted Elk, 85 N.W. 2d 432 (N.D. 1957)..... 14

Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685 (1965)..... 36

Washington v. Yakima Indian Nation, 439 U.S. 463 (1979)..31,32,41,42

White Eagle v. Dorgan, 209 N.W. 2d 621 (N.D. 1973)..... 15

White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980)..... 24

Whiting v. Hoffine, 294 N.W. 2d 921 (S.D. 1980)..... 21

Williams v. Lee, 358 U.S.
217 (1959) 14,15,22,36

Worcester v. Georgia,
31 U.S. (6 Pet.) 515 (1832)..17,18,19,20,22

CONSTITUTION, STATUTES
AND REGULATIONS:

Act of Feb. 22, 1889,
§ 4, 25 Stat. 676 12

Act of March 3, 1891,
26 Stat. 1032..... 4

Act of August 15, 1953,
67 Stat. 588, codified in
part at 18 U.S.C. § 1162
and 28 U.S.C. § 1360..... Passim

United States Constitution,
Amendment XIV.....40,47

25 C.F.R. §§ 11.1(a),
11.22 (1982)..... 9

18 U.S.C. § 1162 7,27

25 U.S.C. § 1321-26..... 13,16,28

25 U.S.C. § 476, Indian
Reorganization Act 4

28 U.S.C. § 1360.....7,27

42 U.S.C. § 1981..... 40,47

Ft. Berthold Tribal C.
ch. II § 1(a)..... 9

N.D. Const. art I § 9..... 44

N.D. Const. art XVI § 203..... 11,13,29

N.D. Cent. C. § 10-19-09
to -11 8

N.D. Cent. C. § 27-19-01..11,12,13,16,29

N.D.R. Civ. P. 4(a) & (b)
§ 54-01-18..... 8

MISCELLANEOUS

F. Cohen, Handbook of Federal
Indian Law (1982 ed.).....9,18,19,22,24

Currie and Schreter,
Unconstitutional Discrimination
in the Conflict of Laws: Privi-
leges and Immunities, 69 Yale
L.J. 1323 (1960)..... 44

Goldberg, Public Law 280: The
Limits of State Jurisdiction
Over Reservation Indians,
22 U.C.L.A. L.Rev. 535 (1975)..... 30

Hearings on H.R. 1063 before
Sub-Committee on Indian Affairs,
83d Cong., 1st Sess. (June 29,
1953)..... 35,36

Hearing on H.R. 15419
and Related Bills Before the
Subcommittee on Indian Affairs
of the House Committee on
Interior & Insular Affairs,
90th Cong., 2d Sess. 25
(1968)..... 37

H.R. Rep. No. 848, 83rd
Cong., 1st Sess. (1953).....33,34

S.Rep. No. 699, 83rd Cong.,
1st Sess. (1953)..... 35

S.Rep. No. 90-721, 90th Cong.,
1st Sess. 32 (1968)..... 37

114 Cong. Rec. 9560, 9596,
9615 (1968)..... 38

No. 82-629

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, Petitioner,

v.

WOLD ENGINEERING, P.C., and SCHMIDT, SMITH & RUSH, Respondents.

On Certiorari to the Supreme Court of North Dakota

MOTION FOR LEAVE TO FILE BRIEF OF TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS AS AMICUS CURIAE

Pursuant to Rule 36.3, the Turtle Mountain Band of Chippewa Indians moves the Court for leave to file the attached brief amicus curiae in support of petitioner in the above-captioned case. Amicus requested the parties to consent to the filing of this brief. Petitioner Three Affiliated Tribes has consented

as has Respondent Schmit, Smith & Rush. Respondent Wold Engineering has refused to consent. (Consents filed).

Amicus is a federally-recognized Indian tribe whose reservation is located in Rolette County, North Dakota. Amicus has a great interest in the case, since if the decision below is affirmed, individual Indian plaintiffs and tribal plaintiffs will be deprived of access to state courts. As a Tribe whose reservation is located in North Dakota, amicus has a direct interest in its own access to state court as well as the access of its members.

Amicus submits the attached brief in order to assist the Court in recognizing that the decision of the North Dakota Supreme Court is neither authorized nor required by federal law

and that it denies Indian plaintiffs due process of law and equal protection of the laws. The immediate parties are likely not to address specific points which amicus discusses and therefore amicus requests that its motion be granted.

Respectfully submitted,

Kim Jerome Gottschalk*
Richard B. Collins
Native American
Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Turtle
Mountain Band of
Chippewa Indians,
Amicus Curiae

*Counsel of Record

QUESTIONS PRESENTED

1. Does Public Law 83-280 or any other federal law authorize or require North Dakota to deny its courts jurisdiction over civil actions arising in Indian country by Indians or tribes against non-Indian residents of the State?

2. Does North Dakota's attempt to deny its court jurisdiction over civil actions arising in Indian country by Indians or tribes against non-Indian residents of the State violate 42 U.S.C. § 1981 or the fourteenth amendment?

No. 82-629

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, Petitioner,

v.

WOLD ENGINEERING, P.C. and SCHMIDT, SMITH & RUSH, Respondents.

On Certiorari to the Supreme Court of North Dakota

AMICUS BRIEF OF THE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

INTEREST OF AMICUS

Amicus is a federally-recognized Tribe whose reservation is located in Rolette County, North Dakota. Amicus has an interest in the case, since if the decision below is affirmed, individual Indian and tribal plaintiffs will be deprived of access to state

courts. As a Tribe whose reservation is located in North Dakota, amicus has a direct interest in its own access to state court as well as the access of its members.

Amicus submits the attached brief to assist the Court in recognizing that the decision below is neither authorized nor required by federal law and that it denies Indian plaintiffs due process of law and equal protection of the laws.

STATUTES INVOLVED

The applicable federal and North Dakota laws are set out in the Appendix to petitioner's brief.

STATEMENT OF THE CASE

This case concerns the Fort Berthold Indian Reservation in North Dakota, set aside for the Three Affiliated Tribes (Arikara, Mandan, and Gros

Ventre) by the Act of March 3, 1891 26 Stat. 1032. See City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972). The Reservation consists of a rectangular tract in the northwest quarter of the State, bisected by the Missouri River. Id. The Three Affiliated Tribes are organized under a constitution approved by the Secretary of the Interior under Section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

In 1974, respondent Wold Engineering, P.C., contracted with the Tribes to design and construct a water intake system. The system was designed to supply domestic water to the Four Bears Community, which includes the Tribal Administration Building and the Four Bears Motel, all situated within the

Fort Berthold Reservation. Pet. 4a. Wold is a professional corporation chartered under North Dakota law and owned by non-Indians. Its principal place of business is at Bottineau, North Dakota, located outside the Fort Berthold Reservation. Wold subcontracted part of the work to the repsondent Schmidt, Smith & Rush. Pet. 6a-7a.

Wold and Schmidt completed construction in July 1977. But during the winter of 1977-78, the water system froze and became inoperable. Efforts to adjust the dispute failed, and in April 1980 the Tribes filed a civil action in the North Dakota District Court for Ward County. The Tribes' action sought damages based on negligent design and breach of contract.

Wold was duly served, appeared and filed an answer. Trial of the action began on January 12, 1982, at which time Wold moved to dismiss on the ground that the action arose in Indian country and the State court had no jurisdiction. The trial court granted Wold's motion, and the Tribes appealed. Pet. 4a.

The North Dakota Supreme Court affirmed and issued an opinion. The immediate basis for its decision was failure of the Fort Berthold Indians to comply with a state statute, N.D. Cent. C § 27-19-01, which requires Indian consent to state jurisdiction on an Indian reservation. The statute was based on art. XVI § 203 of the North Dakota Constitution. But these provisions in turn depend upon the scope of federal Public Law 83-280, the Act of Aug. 15, 1953, 67 Stat. 588,

codified in part at 18 U.S.C. § 1162 and 28 U.S.C. § 1360, and commonly called Public Law 280. The basic federal issue in this case is whether Public Law 280 authorizes or requires the decision of the court below and the state laws upon which it was based. This issue was raised and argued in both the state trial court and in the state supreme court, as the latter court's opinion shows. We discuss the relation of the state laws to Public Law 280 in the first part of our argument infra. The Tribes also contended in the court below that the State's action violates the fourteenth amendment; this argument was also rejected. Pet. 8a - 10a.

Under North Dakota law in effect when this action was filed (and today), there were four separate bases for

state court jurisdiction over this action. First, defendant Wold was a state-chartered corporation. Such corporations may be sued in North Dakota by service upon their resident registered agents. N.D. Cent. C. §§ 10-19-09 to -11. Second, Wold's principal place of business was in North Dakota, making it a resident for jurisdiction purposes. State residents may be sued in North Dakota courts. Id. § 54-01-18; N.D.R. Civ. P. 4(a), (b). Third, Wold was served with process in North Dakota. The State follows the usual Anglo-American rule that service is enough to acquire jurisdiction. N.D.R. Civ. P. 4(b). Fourth, the causes of action alleged in the complaint arose within North Dakota. This alone would normally be a sufficient basis for state court

jurisdiction under the State's "long arm" rule. Id. The court below implicitly determined that all of these jurisdictional bases were defeated by the state laws (mistakenly viewed as authorized or required by federal law) cited in the paragraph above, because the causes of action arose in Indian country. Even Wold's off-reservation residence was disregarded as a basis for jurisdiction.

When this action was filed, the tribal court lacked jurisdiction over civil actions against non-Indian defendants except by consent.[1/]

1/ Ft. Berthold Tribal C. ch. II § 1(a). The provision was essentially identical to the analogous provisions in the Code of Federal Regulations governing Courts of Indian Offenses set up by the Bureau of Indian Affairs. 25 C.F.R. §§ 11.1(a), 11.22 (1982). See, F. Cohen, Handbook of Federal Indian Law 333-35 (1982 ed.). In October 1982,
(continued on page 10)

SUMMARY OF ARGUMENT

The decision below was contrary to established federal law and was based on a misconstruction of federal P.L. 280. Additionally, for state law to deprive Indians and Indian tribes of access to state courts in the circumstances presented in this case, deprives them of due process and equal protection of the law.

ARGUMENT

I. FEDERAL LAW DOES NOT AUTHORIZE OR REQUIRE NORTH DAKOTA TO DENY ITS COURTS JURISDICTION OVER CIVIL ACTIONS ARISING IN INDIAN COUNTRY BY INDIANS OR TRIBES AGAINST NON-INDIAN RESIDENTS OF THE STATE.

1/ (continued from page 9) after the decision below, the Tribes amended their laws to extend civil jurisdiction over actions against non-Indians regardless of consent. The amendment was approved by the Secretary of the Interior.

A. The Decision Below Was Based on Federal Law.

As pointed out in our Statement, the North Dakota Supreme Court based its decision on a state statute, N.D. Cent. C. § 27-19-01, passed pursuant to art. XVI § 203 of the North Dakota Constitution. But the text and history of both provisions, and the state court's interpretation of them, depend on the view that a federal statute, Public Law 280, compelled or at least authorized the ruling below.

Section 203 of the North Dakota Constitution was part of the State's original constitution of 1889. It requires that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." Pet. 6a. This

provision was required by Section 4 of the Enabling Act for North Dakota (and other States). Act of Feb. 22, 1889, § 4, 25 Stat. 676. The federal statute also required that the State's constitutional limitation not be repealed without the consent of Congress.

In 1963, the North Dakota legislature enacted N.D. Cent. C. ch. 27-19, including § 27-19-01, which "permits" the State's courts to assume jurisdiction over "all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner" specified in the statute. The statute's terms state that such

exercise of state court jurisdiction would be "[i]n accordance with...Public Law 280" and § 203 of the state constitution, and the statute's terms track those of Public Law 280.[2/] See also Part C infra.

In its opinion below the North Dakota Supreme Court said that the 1958 amendment to § 203 of the state constitution was made "[u]nder the authority of Public Law 280." Pet. 6a. The court used the same phrase to describe the enactment of N.D. Cent. C. § 27-19-01. Pet. 7a. The court quoted with approval from an earlier opinion in which it said that the state courts "are not at liberty to

---

2/ In 1968 Congress amended Public Law 280. See 25 U.S.C. §§ 1321-1326. The 1968 statute added a requirement for tribal consent to state assumptions or jurisdiction. See Part D infra.

exercise jurisdiction [on Indian reservations]," citing this Court's decision in Williams v. Lee, 358 U.S. 217 (1959). Pet. 8a. The court concluded its opinion by stating that "the people of North Dakota and the legislature were acting under explicit authority granted by Congress in the exercise of its federal power over Indians when our Constitution was amended and Chapter 27-19, N.D.C.C., was enacted." Pet. 10a. The court's first opinion construing this statute used the same reasoning. In re Whiteshield, 124 N.W. 2d 694 (N.D. 1963).[3]

3/ Prior North Dakota law seemed to show that the State has no policy against jurisdiction in the instant case independent of the authority of Public Law 280. In Vermillion v. Spotted Elk, 85 N.W. 2d 432 (N.D. 1957), the court sustained state court jurisdiction over an Indian country tort action against an Indian defendant. That decision
(footnote continued on page 15)

3/ (continued from page 14)

was plainly inconsistent with this Court's subsequent decision in Williams v. Lee, 358 U.S. 217 (1959). The state court so recognized in Gourneau v. Smith, 207 N.W. 2d 256 (N.D. 1973), repudiating the Vermillion holding. But the Vermillion court had favorably relied on Bonnett v. Seekins, 126 Mont. 24, 243 P.2d 317 (1952), in which the Montana court had sustained state court jurisdiction over an Indian country action by an Indian against a non-Indian. 85 N.W. 2d at 437. In White Eagle v. Dorgan, 209 N.W. 2d 621 (N.D. 1973), the court decided the merits of an Indian country action by reservation Indians against non-Indians, although no challenge to jurisdiction was made. And in Rolette County v. Eltogbi, 221 N.W. 2d 645 (N.D. 1974), the court sustained state court jurisdiction over a child support action on behalf of reservation Indians against a non-Indian residing outside Indian country on the grounds that "Indians have the right to sue non-Indians in State courts." Id. at 648 (alternative holding). The opinion below in the instant case purported to distinguish Eltogbi as an off-reservation case. Pet. 7a n. 1. However, it is hard to see why the off-reservation residence of the defendant there was different from that of Wold here.

Another demonstration that the State was attempting to follow Public Law 280 derives from the history of the individual Indian consent provision in the 1963 state statute. As originally enacted, the statute allowed Indian consent to state court jurisdiction either by tribal majority vote (petition or referendum) or by individual consent in writing. See N.D. Cent. C. §§ 27-19-02. But in Nelson v. Dubois, 232 N.W. 2d 53 (N.D. 1975), the court held the individual consent provision to be invalid under the 1968 amendment to Public Law 280. The latter act provides for tribal but not individual consent. 25 U.S.C. §§ 1322, 1326. Plainly, the North Dakota court viewed the 1963 state statute as dependent on Public Law 280.

Therefore, the decision below was based on the view that Public Law 280 authorized or required North Dakota to deny jurisdiction over this action. We shall show in the following sections that the State's construction of Public Law 280 was erroneous and that no federal law required or authorized the state to deny its courts jurisdiction over this action. Although the state courts relied on Public Law 280, a review of this court's general decisions on Indian country jurisdiction will place Public Law 280 in perspective.

B. This Court's Decisions on Indian Country Jurisdiction Do Not Support The Decision Below.

In Worcester v. Georgia, 31 U.S. (6 Pet.) 515 (1832), the Court held invalid Georgia's attempt to punish

two non-Indian missionaries residing in Cherokee country in violation of state law. The Court held that the Constitution delegated from the people to the federal government paramount legislative authority over relations with the Indian tribes. The Court construed the treaties between the Cherokees and the United States, and the federal statutes governing Indian affairs, to have reserved self-government to the Cherokees within their retained territory, subject only to federal treaties and laws. Under this scheme, the Court concluded that "the laws of Georgia can have no force" in Cherokee country. Id. at 561. See F. Cohen, Handbook of Federal Indian Law 259-61 (1982 ed.).

Since Worcester, the Court and Congress have adhered to the Worcester

holding on the constitutional power of the federal government, and Worcester's recognition of retained tribal sovereignty has been applied to all Indian reservations except when altered by a governing act of Congress. See Cohen, supra, at 261-64, 367-70. But federal law governing non-Indians in Indian country has changed since 1832. See Cohen at 261-62, 264-66. Cases came to this court from Indian country in which the only parties directly concerned were non-Indians. In United States v. McBratney, 104 U.S. 621 (1882), the Court held that state courts had jurisdiction to try a white man accused of murdering a white victim in Indian country, and the federal courts lacked jurisdiction. Other decisions sustained state civil jurisdiction over non-

Indians in Indian country. E.g., Montana Catholic Missions v. Missoula County, 200 U.S. 118 (1906) (which, like Worcester, involved missionaries to the Indians). See Cohen at 266.

Other cases came to the Court in which Indians had sued non-Indians in state courts. In Felix v. Patrick, 145 U.S. 317, 332 (1892), the Court rejected a response to the defense of laches by noting that a state court would have had jurisdiction over an action by Indians against non-Indians, although the case does not seem to have arisen in Indian country. In United States v. Candelaria, 271 U.S. 432 (1926), the Court sustained a plea of res judicata based on a prior case in which the Pueblo of Laguna, represented by federal attorneys, had sued non-

Indian defendants in the territorial and state courts of New Mexico. The case had involved a dispute over title to land within the boundaries of the Pueblo's territory.[4/] The Court expressly decided that "the state court had jurisdiction to entertain the suit and to proceed to judgment or decree." Id. at 444. Candelaria is squarely at odds with the decision below in this case. A number of state court decisions have also sustained state court jurisdiction over actions by Indians against non-Indians that arose in Indian country. See, e.g., Whiting v. Hoffine, 294 N.W. 2d 921,

4/ In United States v. Sandoval, 231 U.S. (1913), the Court held that the territory of a New Mexico Pueblo tribe was Indian country.

923-24 (S.D. 1980); McCrea v. Busch, 164 Mont. 442, 524 P.2d 781 (1974); Paiz v. Hughes, 76 N.M. 562, 417 P.2d 317 (1952); Red Hawk v. Joines, 129 Or. 620, 278 P.2d 572 (1929). See also, Cohen, supra at 355.

In Williams v. Lee, 358 U.S. 217 (1959), a non-Indian merchant sued an Indian couple in an Arizona state court to enforce an alleged debt. The defendants resided on the Navajo reservation, and the transactions at issue occurred there. This court relied on Worcester v. Georgia to hold that since the Navajo Court of Indian Offenses had jurisdiction, its jurisdiction was exclusive of that of the Arizona courts. But the court acknowledged that Indian country jurisdiction had changed since Worcester was decided. 358 U.S. at

219. In support of this observation, the Court cited with approval United States v. Candelaria, supra, and other cases sustaining state court jurisdiction over non-Indians in Indian country. 358 U.S. at 219-20. The Court concluded that "Absent governing Act of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Id. at 220.

In many later cases, the Court has reviewed the merits of state court actions by Indians or tribes against non-Indian state officials based on transactions or events in Indian country. Ramah Navajo School Bd. v. New Mexico Bureau of Revenue, 102 S.Ct. 3394 (1982); Central Machinery Co. v. Arizona Tax

Comm'n., 448 U.S. 160 (1980); White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Bryan v. Itasca County 426 U.S. 373 (1976) (municipal corporation); Moe v. Salish & Kootenai Tribes 425 U.S. 463 (1976); McClanahan v. Arizona Tax Comm'n., 411 U.S. 164 (1973). Cf., Poafpybitty v. Skelly Oil Co., 390 U.S. 365 (1968). These decisions establish two general rules. Indian defendants in Indian country are not subject to state jurisdiction unless Congress authorizes it, but non-Indian defendants in Indian country are subject to state jurisdiction unless a federal statute or treaty preempts state jurisdiction or state jurisdiction would interfere with the Indians "right to make their own laws and be ruled by them." See Cohen at 349-57.

The court below did not rely on infringement of tribal self-government to sustain its decision, nor could it. The Tribe directly consented to state court jurisdiction by filing this action. Rather, the court invoked Public Law 280. In the next section, we shall show that P.L. 280 does not support the decision below.

C. Public Law 280 Does Not Support The Decision Below

1. By Its Terms, Public Law 280 Is Confined to Assumption of State Jurisdiction; It Does Not Authorize Withdrawal of Pre-Existing Jurisdiction

As set out in previous sections, federal law prior to the passage of Public Law 280 in 1953 did not authorize or require a State to deny its courts jurisdiction over civil actions arising in Indian country

against non-Indian residents of the State. Hence the decision below was based on the proposition that Public Law 280 decreased state jurisdiction in Indian country, at least to the extent of authorizing North Dakota to withdraw state court jurisdiction over actions such as this one. We shall show that North Dakota's action was based on an erroneous construction of Public Law 280.

The purpose of Public Law 280 was to increase state court jurisdiction in some areas of Indian country, not to decrease it. Sections 1-4 of the Act imposed partial criminal and civil jurisdiction on the courts of five states (not including North Dakota) over Indian country therein. The statutory words are, the States "shall have

jurisdiction" over certain offenses and civil causes of action. 67 Stat. 588. See 18 U.S.C. § 1162, 28 U.S.C. § 1360. Sections 6 and 7 of the Act authorized any other State to assume the same jurisdiction imposed on the five named States. These sections use the words "assumption of civil and criminal jurisdiction," "assumption of jurisdiction," and "assume jurisdiction." More directly on point, Section 7 begins:

> The consent of the United States is hereby given to any other State not having jurisdiction ...(emphasis added).

These words cannot reasonably be read to authorize (much less compel) a State to withdraw Indian country jurisdiction over non-Indians that the State had prior to the statute.

The amended version of Public Law 280 adopted in 1968 is equally clear. The section on civil causes of action, 25 U.S.C. § 1322, begins:

> § 1322. Assumption by State of Civil Jurisdiction.
>
> (a) Consent of United States; force and effect of civil laws
>
> The consent of the United States is hereby given to any States not having jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country situated within such State to assume, with the consent of the tribe occupying the particular Indian country or part thereof, which would be affected by such assumption, such measure of jurisdiction over any and all such civil causes of action arising within such Indian country.

The clear language of the statute again authorizes only additions to state jurisdiction. [5/]

5/ The people of North Dakota apparently recognized that Public Law

(continued on page 29)

2. The Legislative History and This Court's Decisions Show That Public Law 280 Was Concerned Only With the Assumption of Jurisdiction, Not with Withdrawal of Pre-Existing Jurisdiction.

This Court has aptly characterized the legislative history of Public Law 280 as "sparse". Bryan v. Itasca County, 426 U.S. 373, 379 (1976). This is

---

5/ (continued on page 28) 280 pertained to assumption of jurisdiction. This is evident from the language of the proviso added to Section 203 of their Constitution in 1958:

> The legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress ..." Article XIII, § 1, N.D. Const.

N.D.C.C. § 27-19-01 provides that "In accordance with the provisions of Public Law 280...jurisdiction of the state of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided by this section." (Emphasis added). See Sec. A, supra.

especially true of the provisions dealing with civil jurisdiction, since the primary concern of Congress in enacting Public Law 280 "was with the problem of lawlessness on certain Indian reservations, and the absence of adequate tribal institutions for law enforcement." Id. citing Goldberg, Public Law 280: The Limits of State Jurisdiction Over Reservation Indians, 22 U.C.L.A. L.Rev. 535, 541-42 (1975).

In Bryan v. Itasca County, supra the Court held that Public Law 280 did not extend general state civil regulatory authority to Indian reservations. Rather, the Court stated that the civil part of Public Law 280 should be read "as simply a reaffirmation of the existing reservation Indian-Federal Government relationship in all respects

save the conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians." Id. at 391. (emphasis added). Thus, other than the conferral of jurisdiction intended by Public Law 280, existing law on state jurisdiction was left undisturbed.

In Washington v. Yakima Indian Nation, 439 U.S. 463 (1979) the Court upheld Washington's piecemeal extension of jurisdiction under Public Law 280. Washington had not amended its constitution to eliminate the disclaimer of jurisdiction required by its Enabling Act (the same Act by which North Dakota was authorized to become a State). This Court observed that "...the circumstances surrounding the passage of Public Law 280 in themselves

fully bear out the State's general thesis that Public Law 280 was intended to facilitate not to impede the transfer of jurisdictional responsibility to the States." 439 U.S. at 490. (Emphasis added). The Courth held that less than full assumptions of jurisdiction were allowed by Public Law 280 in part because a requirement that a State can accept all or none of the proffered jurisdiction would impede rather than facilitate desired transfers. 439 U.S. at 497. This view leaves no room for an authorization to withdraw jurisdiction.

The legislative history is replete with references indicating that Congress was concerned solely with the assumption of jurisdiction by the States. The original bill dealt only with the extension of jurisdiction to California,

but as H.R. Rep. No. 848, 83rd Cong., 1st Sess. (1953) indicates, the bill was amended to

> "(1) confer as of date of enactment, civil and criminal jurisdiction on the States of California, Minnesota, Nebraska, Oregon, Wisconsin, (Sec. 4, emphasis added).
>
> * * *
>
> (2) give consent of the United States to those States presently having organic laws expressly disclaiming jurisdiction to acquire jurisdiction subsequent to enactment by amending or repealing such disclaimer laws. (Sec. 6, emphasis added).
>
> * * *
>
> (3) give consent to all other States to acquire jurisdiction over criminal offenses or civil causes at such time and in such manner as by affirmative legislative action such States may elect to acquire jurisdiction. (Sec. 7, emphasis added).

Id. at 6-7.

In a letter included in the same report, the Assistant Secretary of the Interior reported on the views of the States and Indian groups on the question of the "transfer of civil and criminal jurisdiction over Indians on their reservations to the respective States." Id. at 7-8. (emphasis added). Those Indian tribes expressing opposition to the transfer were excepted from the automatic grant of jurisdiction of the Act. The Warm Springs Tribe and the Colville and Yakima Tribes opposed the application of the Act to them because they feared inequitable treatment in state courts. Id. at 7-8. This fear is only relevant in those cases when Indians are defendants in state courts, since Indians who have voluntarily chosen a state forum have waived any right to complain of inequi-

table treatment. S. Rep. No. 699, 83rd Cong., 1st Sess., (1953) also speaks of the purpose of the bill as being "to confer" jurisdiction.

In Hearings on H.R. 1063 before the Subcommittee on Indian Affairs, 83rd Cong., 1st Sess. (June 29, 1953) (unpublished but lodged with the Clerk of this Court), the bill (prior to amendment to include more states) is described as providing for an "extension" of jurisdiction. Mr. Sellery, Chief Counsel, Bureau of Indian Affairs, testified on H.R. 1063 prior to its expansion to cover other States:

> Consequently, the Department believes there is a serious hiatus in law enforcement authority that can best be remedied by conferring criminal jurisdiction on the State, and the Indians of California have also reached a stage that makes desirable the extension

> of State civil jurisdiction to the Indian country in that State.

Id. at 2-3. Repeated references are made to those Indian groups opposing the "cession" of jurisdiction to the States or being "subjected" to state jurisdiction Id. at 13, 17, 22. Once again, these concerns are understandable only in the context of Indians being sued as defendants. See also Id. passim (July 15, 1953) (hearing on committee amendments extending scope).

Other decisions of this Court describe Public Law 280 as designed to accomplish a transfer of jurisdiction to and assumption of jurisdiction by the States. See, e.g., Williams v. Lee, supra, 358 U.S. at 222-223; Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685, 687 n. 3 (1965); Kennerly

v. District Court, supra, 400 U.S. at 427, 428 (1971); McClanahan v. Arizona Tax Comm'n., supra, 411 U.S. at 177-78; Fisher v. District Court, 424 U.S. 382 (1976); Bryan v. Itasca County, 426 U.S. 463 (1979).

The same view is reflected in the legislative history of the 1968 Act that amended Public Law 280. See, e.g, S. Rep. No. 90-721, 90th Cong., 1st Sess. 32 (1968) (additional views of Senator Ervin); Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcommittee on Indian Affairs of the House Committee on Interior and Insular Affairs, 90th Cong. 2d Sess. 25 (1968) (referring to tribal consent requirement to assumption of jurisdiction to ensure that Indians are

not "subjected" to state courts before they are ready); id. at 27, 32, 38, 91 (discussing Paiz v. Hughes, supra, in which an Indian sued a non-Indian), 104, 108-109, 115-16, 120-121, 133; 114 Cong. Rec. 9560, 9596, 9615 (1968); id. at 5520 (Presidential message).

The legislative history and this Court's decisions foreclose an interpretation of Public Law 280 that would allow for withdrawal of pre-existing jurisdiction.

D. The State Statute Did Not Comply With Public Law 280

A distinct reason that Public Law 280 did not authorize passage of the state statute upon which the court below relied is that the state statute did not comply with the requirements of Public Law 280. As described

above, sections 6 and 7 of Public Law 280 authorized States not named in sections 1-4 to "assume" jurisdiction over Indian country by affirmative state action. The operative words in sections 6 and 7 are "assumptions of jurisdiction" and "assume jurisdiction." But N.D. Cent. C. ch. 27-19 did not assume any jurisdiction. While it agreed to accept jurisdiction upon Indian consent, no tribe in fact consented. No jurisdiction was in fact assumed, so Public Law 280 has never applied. For this reason, reliance on it by the court below was misplaced. See Kennerly v. District Court, 400 U.S. 423 (1971).

II. NORTH DAKOTA'S DENIAL OF JURISDICTION OVER THIS ACTION VIOLATES 42 U.S.C. § 1981 AND THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Argument I of this brief is based on the premise that the North Dakota laws at issue, and the decisions below, were intended to be passed under the authority of Public Law 280. See Part IA supra. Assuming the contrary, that North Dakota purported to act on independent state authority, we shall show in this part that its action is invalid under governing federal law.

A. The State's Action Violates 42 U.S.C. § 1981

42 U.S.C. § 1981 provides in relevant part that "All persons within the jurisdiction of the United States shall have the same right in every

State...to sue...as is enjoyed by white citizens...." The plain language of the statute is dispositive of the case here.[6/] Cf. Martinez v. Fox Valley Bus Lines, Inc., 17 F.Supp. 576 (N.D. Ill. 1936).

B. The State's Action Violates The Fourteenth Amendment

1. North Dakota's Rule Denies Indians and Tribes Equal Protection

The court below sustained the North Dakota laws at issue against an equal protection attack by relying on this Court's holding in Washington v. Yakima Indian Nation, 439 U.S. 463

6/ That this point was not raised below is not relevant. It is a pure question of law and may be raised for the first time on appeal. Alaska Chapter Associated General Contr. v. Pierce, 694 F.2d 1162 (9th Cir. 1982).

(1979). Pet. 8a - 10a. This reliance is misplaced. In Yakima, this Court sustained a Washington law taking jurisdiction under Public Law 280. But Washington's law was within the scope of Public Law 280 and authorized by it, as the Court determined. Id. at 500. As set out above, North Dakota's denial of state court jurisdiction over non-Indians in Indian country is not authorized by Public Law 280. Hence, Yakima is not authority to sustain North Dakota's law.

Moreover, the Court's opinion in Yakima raises serious doubts about North Dakota's action. The Yakima court relied on the well-established rule that federal legislation treating tribal Indians as a distinct

class is justified by "the unique legal status of Indian tribes under federal law." 439 U.S. at 501. The same jurisdiction sustains similar state laws when they are authorized by federal law. Id. But North Dakota's denial of state court jurisdiction over non-Indians in Indian country, having no federal backing, must be judged by a stricter standard. "States do not enjoy this same unique relationship with Indians." Id.

North Dakota's rule denies access to its courts to a class of reservation Indians and tribal plaintiffs suing non-Indian residents of the State when the cause of action arises in Indian country. Access to courts is an important right, one that this Court has recognized as fundamental in some contexts. See Douglas v. California, 372 U.S. 353

(1963); Griffin v. Illinois, 351 U.S. 12 (1956). See also Cornfield v. Coryell, 6 F.Cas. 546, 552 (C.C.E.D. Pa. 1825) (No. 3230) quoted in Baldwin v. Montana Fish and Game Comm'n., 436 U.S. 371, 384 (1978) (access to state courts among the fundamental rights guaranteed to non-resident citizens) Currie and Schreter, Unconstitutional Discrimination in the Conflict of Laws: Privileges & Immunities, 69 Yale L.J. 1323, 1379-89 (1960). 7/

At a minimum, the State's classification must bear a rational relation to a legitimate state purpose. Logan v. Zimmerman Brush Co., 455 U.S.

7/ North Dakota law is consistent, because the North Dakota constitution guarantees equal access to the State's courts. N.D. Const. art. I § 9.

422, 439 (1982); United States Dept. of Agriculture v. Moreno, 413 U.S. 528, 533 (1973). No state purpose to justify North Dakota's rule at issue here appears in the opinion below or elsewhere in the record of this case. Rather, North Dakota's action was taken in misguided reliance on Public Law 280. See Part I.A supra. Shorn of that support, the State law has no rational basis and denies petitioner and others similarly situated the equal protection of the State's laws.

2. North Dakota's Rule Denies Indians and Tribes Due Process of Law

A State law denying access to its courts denies due process of law unless justified by "the magnitude of the governmental interests involved."

Logan v. Zimmerman Brush Co., 455 U.S. 422, 434 (1982). See also Little v. Streater, 452 U.S. 1 (1981); Boddie v. Connecticut, 401 U.S. 371 (1971). No significant interest of the State is identified in the opinion below. Again, the State acted in mistaken reliance on the authority of Public Law 280. Thus the State's action denies petitioner and others similarly situated due process of law.

CONCLUSION

For the reasons stated, this Court should reverse the decision below, declare that no federal law authorized or required North Dakota to deny its courts jurisdiction over Indian country causes of action by Indians or tribes against non-Indian

state residents, declare that the State's action violated Public Law 280, 42 U.S.C. § 1981 or violated the Fourteenth Amendment, and remand for futher proceedings.

Respectfully submitted,

Kim Jerome Gottschalk*
Richard B. Collins
Native American
Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

Counsel for Amicus Curiae

*Counsel of Record

July 1983

(THIS PAGE INTENTIONALLY LEFT BLANK)

Office-Supreme Court, U.S.
FILED
AUG 15 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-629

In the Supreme Court of the United States

October Term, 1982

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., AND SCHMIDT, SMITH & RUSH, P.C.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

OBJECTION OF RESPONDENT, WOLD ENGINEERING TO MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

HUGH McCUTCHEON
(Counsel of Record)
BOSARD, McCUTCHEON & RAU, LTD.
200 Heritage Place
P.O. Box 939
Minot, North Dakota 58702-0939
Counsel for Respondent, Wold Engineering, P.C.

August, 1983

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

QUESTION PRESENTED

1. Whether the Motion For Leave To File an Amicus Brief of Turtle Mountain meets the requirements of Rule 36 of the Rules of the Supreme Court of the United States.

TABLE OF CONTENTS

QUESTION PRESENTED I
TABLE OF CONTENTS III
TABLE OF AUTHORITIES III
STATEMENT OF THE CASE 1
SUMMARY OF THE ARGUMENT 2
ARGUMENT 2
CONCLUSION 8

TABLE OF AUTHORITIES

Rule 36, Supreme Court of the United States 2

No. 82-629

In the Supreme Court of the United States

October Term, 1982

THREE AFFILIATED TRIBES OF THE
FORT BERTHOLD RESERVATION,
Petitioner,

vs.

WOLD ENGINEERING, P.C., AND SCHMIDT,
SMITH & RUSH, P.C.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME COURT OF NORTH DAKOTA

OBJECTION OF RESPONDENT, WOLD ENGINEERING TO MOTION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE TURTLE MOUNTAIN BAND OF CHIPPEWA INDIANS

STATEMENT OF THE CASE

The Turtle Mountain Band of Chippewa Indians, hereafter referred to as Turtle Mountain, have requested, via telephone, permission from Wold Engineering to file a brief as amicus curiae in support of Petitioner. Turtle Mountain asserts that its tribal members would be affected by the Supreme Court's decision in this case. Wold determined that the reasons stated by Turtle Mountain were insufficient to justify the filing of amicus briefs and therefore withheld its consent.

Turtle Mountain now makes its Motion, and has filed a supporting brief for permission of this Court to file. Wold objects to this Motion.

SUMMARY OF THE ARGUMENT

Respondent, Wold Engineering, asserts that Turtle Mountain has failed to comply with Rule 36.3 of the Rules of the Supreme Court of the United States and should therefore be denied leave to file a brief as amicus curiae. Rule 36.3 provides, in relevant part,

> "The motion shall concisely . . . set forth facts or questions of law that have not been, or reasons for believing that they will not adequately be, presented by the parties, . . ."

Turtle Mountain has failed to set forth any facts or questions of law that have not been presented by the parties. Likewise, Turtle Mountain has failed to set forth reasons for believing the facts and questions of law set forth in its motion will not be adequately presented by the parties. Turtle Mountain should therefore be denied leave to file its amicus brief.

ARGUMENT

The facts and questions of law set forth in the argument of Turtle Mountain are fully presented in Three Affiliated Tribes' brief.

Turtle Mountain's motion asserts as its interest tribal access to State Court. Three Affiliated Tribes' brief addresses the identical argument.

The specific facts and questions of law advanced by Turtle Mountain are adequately presented by Three Affiliated Tribes as follows below.

Turtle Mountain, in its motion and in its brief at §IA argues that in reaching its decision in the present case the

North Dakota Supreme Court incorrectly relied on the premise that P.L. 280 and United States Supreme Court decisions compelled or authorized the State Court holding. Section IIA of Three Affiliated Tribes' brief on the merits argues:

> "The North Dakota Supreme Court regarded federal Indian law, particularly P.L. 280 and the decisions of this court interpreting that statute, as compelling or authorizing the result below." (Pet. p. 10).

The arguments differ in form only, and no new argument is presented by Turtle Mountain. Turtle Mountain's brief §IB asserts that United States Supreme Court decisions in this area establish that:

> "Indian defendants in Indian country are not subject to state jurisdiction unless congress authorizes it, but non-Indian defendants in Indian country are subject to state jurisdiction unless a federal statute or treaty pre-empts state jurisdiction or state jurisdiction would interfere with the Indians' right to make their own laws and be ruled by them." (Amic. p. 24).

Based on this premise, Turtle Mountain concludes that the North Dakota Supreme Court did not and could not sustain its decision. For that Court to hold otherwise would be an infringement on tribal self government and therefore the court must have based its decision on P.L. 280. (Amicus p. 25). Three Affiliated Tribes' brief §IIC entitled, "There Is No Federal Decisional Rule Barring Petitioners Action In State Court" (Pet. p. 16), concludes,

> "The state supreme court has misapplied the federal standard developed in *Williams* in interpreting that rule as to require an absolute bar against Indian claims when those claims implicate no overriding federal or tribal interests in any way."

Therefore, Turtle Mountain's brief §IB is but a cumulative replay of Three Affiliated Tribes' argument in its brief §IIC.

Turtle Mountain's brief §IC asserts: The North Dakota Supreme Court has read P.L. 280 to authorize or compel the court to withdraw pre-existing jurisdiction over civil actions arising in Indian country against non-Indians of the State. Further, the purpose of P.L. 280 was to increase, not decrease jurisdiction in this area and the wording of §§6 and 7 of P.L. 280 (Civil 25 U.S.C. 1332) allows the state to assume jurisdiction. The legislative history referred to by this Court's decisions shows that P.L. 280 was concerned only with the assumption of jurisdiction, not with withdrawal of pre-existing jurisdiction. The argument concludes therefore that P.L. 280 cannot be construed to authorize or compel the state to withdraw jurisdiction.

Three Affiliated Tribes' brief §IB argues that prior to enactment of Chapter 27-19 (enacted as a reaction to P.L. 280) jurisdiction existed in North Dakota courts to hear Indian suits arising from reservation transactions. Three Affiliated Tribes' brief §IIB argues:

> "P.L. 280 has been construed as effecting only the limited withdrawal of federal control or pre-emption in specific subject matter areas so that the states accepting jurisdiction under that statute would be free to exercise their legislative or judicial jurisdiction in those areas." (Pet. p. 20).

Therefore Three Affiliated Tribes concludes P.L. 280 is irrelevant to whether the North Dakota courts have jurisdiction over this type of action. (Pet. p. 27). Turtle Mountain's brief §IC adds nothing new to this argument.

Turtle Mountain's brief §ID concludes §I of its brief by arguing that Chapter 27-19, NDCC, denies rather than assumes jurisdiction. Turtle Mountain argues that P.L. 280 did not authorize this denial and therefore the North Dakota Supreme Court's reliance on the legislature's response to P.L. 280 was misplaced. (Amic. p. 39). Three Affiliated Tribes reaches the same result on this issue in its brief where it concludes:

> "Consequently, the fundamental condition for the validity of the state jurisdictional pattern—set forth at Chapter 27-19 of the state judicial code—as a federally delegated exercise of jurisdiction over Indians is that the state comply with §7 of P.L. 280. This court's decision in *Kennerly* confirms that North Dakota did not. . . . The state's failure to comply with the plain requirement of §7 of the federal statute defeats the state court's contention that the state statute is a federally sanctioned jurisdictional rule compelling the Indians to consent to state jurisdiction before they can have access to state courts." (Pet. p. 34).

Section IC of Turtle Mountain's brief presents no new issue of fact or law, and therefore fails to satisfy the requirements of this Court's rules.

No new facts or questions of law are set forth in Part II of Turtle Mountain's brief. Turtle Mountain argues that North Dakota's denial of jurisdiction over this matter violates 42 U.S.C. §1981; the equal protection of law; and, due process of law. Three Affiliated Tribes covers these identical issues in its brief in §IVA. Turtle Mountain offers no new insight into the resolution of these issues, and its brief is a useless act.

Turtle Mountain's brief §IIB1 argues the North Dakota Supreme Court relied on *Washington v. Yakima In-*

dian Nation, 439 U.S. 463, to sustain the North Dakota laws at issue here. This reliance, Turtle Mountain argues, was misplaced because the Washington law upheld in *Yakima* was within the scope of P.L. 280 and authorized by it. Therefore, Turtle Mountain states the state law has no rational basis and the North Dakota decision denies Three Affiliated Tribes equal protection of the state's laws.

Three Affiliated Tribes' brief §IIIA on this same issue states:

> "The state statute, Chapter 27-19 of the North Dakota Century Code, given that it represents neither a federally compelled or authorized federal judicial rule over Indian affairs, then did not alter, as a matter of federal law, the existing state judicial authority before the enactment of P.L. 280." (Pet. p. 34).

Based on this statement Three Affiliated Tribes then distinguishes the present case from *Yakima*. The issues and their disposition are identical. Three Affiliated Tribes has therefore presented the argument of §IIB1 of Turtle Mountain's brief. Further argument on this point by Turtle Mountain is a repetitious and useless act.

Turtle Mountain's brief §IIB2 asserts that state law denying access to its courts denies due process of law unless justified by "the magnitude of the governmental interests involved." Turtle Mountain concludes that since no significant interest of the state is identified in the opinion below that therefore the state's action denies Petitioner and others similarly situated due process of law.

Three Affiliated Tribes' brief §IVA argues:

> "Chapter 27-19 of the state judicial code bars the adjudication by state courts of cases involving Indian

parties and arising on an Indian reservation in the state."

Three Affiliated Tribes concludes, citing the same authority as is cited by Turtle Mountain, the state court's decision denying it and all other Indian plaintiffs an opportunity to be heard on any claim arising on a reservation is clearly violative of due process. Three Affiliated Tribes has fully argued the point advanced by Turtle Mountain in §IIB2 of its brief.

CONCLUSION

All facts and questions of law set forth by Turtle Mountain in its brief have been presented by Three Affiliated Tribes in this action. Turtle Mountain states no reasons for believing that facts and questions set forth will not adequately be presented by other parties to the action, and its argument in brief is a repetition of the brief of Three Affiliated Tribes. Turtle Mountain has failed to satisfy Rules of the Supreme Court of the United States. The filing of Turtle Mountain's brief will not aid this Court in the resolution of the issues presented, and offers no new issues of law or fact. Turtle Mountain's brief merely parallels the brief of Three Affiliated Tribes, and the filing of Turtle Mountain's brief as amicus curiae ought to be prohibited.

Respectfully submitted this 11th day of August, 1983.

BOSARD, MCCUTCHEON & RAU, LTD.
200 Heritage Place
P.O. Box 939
Minot, North Dakota 58702-0939
Attorneys for Wold Engineering

By: HUGH MCCUTCHEON

Office - Supreme Court, U.S.
FILED
AUG 19 1983
CLERK

No. 82-629

In the Supreme Court of the United States

OCTOBER TERM, 1983

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, PETITIONERS

v.

WOLD ENGINEERING, P.C., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

REX E. LEE
Solicitor General

FRANK HENRY HABICHT II
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ELLEN DURKEE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether a state court in North Dakota had jurisdiction over a suit brought by petitioner Indian Tribes against respondent, a non-Indian professional corporation organized under the laws of North Dakota with offices located in that State but outside the boundaries of the Tribes' Reservation, for negligent design of a water system constructed for the Tribes on the Reservation.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	1
Summary of argument	4
Argument	
The state court was not required or affirmatively authorized by federal law to dismiss the suit by petitioner Tribes against the non-Indian respondent for lack of jurisdiction	6
A. State jurisdiction is not barred by established principles governing the exercise of State power in matters affecting Indians	6
B. Public Law 280 did not authorize the State of North Dakota to disclaim jurisdiction that previously had not been barred by federal law	15
C. A construction of the state constitutional and statutory provisions that barred state court jurisdiction over a suit by an Indian against a non-Indian would raise a substantial constitutional question	25
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, No. 8, Orig. (Mar. 30, 1983)	13
Arizona v. *San Carlos Apache Tribe*, No. 81-2147 (July 1, 1983)	6, 7, 24
Blue-Jacket v. *Commissioners of Johnson County*, 3 Kan. 299, rev'd on other grounds *sub nom.* *The Kansas Indians*, 72 U.S. (5 Wall.) 737	7, 9
Board of County Commissioners v. *Seber*, 318 U.S. 705	13

Cases—Continued Page

Bonnet v. *Seekins*, 126 Mont. 24, 243 P.2d 317 10
Brown v. *Anderson*, 61 Okla. 136, 160 P. 724 10
Bryan v. *Itasca County*, 426 U.S. 373 .....23, 24, 25
Choctaw & Chickasaw Nations v. *Seitz*, 193 F.2d 456 10
Felix v. *Patrick*, 145 U.S. 317 .....7, 8, 9, 24
Fisher v. *District Court*, 424 U.S. 382.....10, 11, 13, 14, 16, 18, 23-24
Gila River Indian Community v. *Henningson*, 626 F.2d 708, cert. denied, 451 U.S. 911 14
Gourneau v. *Smith*, 207 N.W.2d 256 19
Harrison v. *Laveen*, 67 Ariz. 337, 196 P.2d 456.... 9, 10
Johnson v. *Kerr-McGee Oil Industries, Inc.*, 129 Ariz. 393, 631 P.2d 548, cert. denied, 454 U.S. 1025 10
Jones v. *Meehan*, 175 U.S. 1 14
Kennerly v. *District Court*, 400 U.S. 423....10, 11, 13, 14, 16, 19, 23
McCrea v. *Busch*, 164 Mont. 442, 524 P.2d 781 10
McClanahan v. *Arizona State Tax Commission*, 411 U.S. 164 .....9, 23, 24
Merrion v. *Jicarilla Apache Tribe*, 455 U.S. 130.... 12
Mescalero Apache Tribe v. *Jones*, 411 U.S. 145.... 12
Mescalero Apache Tribe v. *Martinez*, 519 F.2d 479 14
Montana v. *United States*, 450 U.S. 544 12
Morton v. *Mancari*, 417 U.S. 535 26
Nelson v. *Dubois*, 232 N.W.2d 54 19
New Mexico v. *Mescalero Apache Tribe*, No. 82-331 (June 13, 1983) 12
Northern Cheyenne Tribe v. *Hollowbreast*, 425 U.S. 649 25
Oneida Indian Nation v. *County of Oneida*, 414 U.S. 661 14
Paiz v. *Hughes*, 76 N.M. 562, 417 P.2d 51 ..... 10, 23
Plyer v. *Doe*, 457 U.S. 202 26
Poafpybitty v. *Skelly Oil Co.*, 390 U.S. 365 ..... 10, 13
Ramah Navajo School Board, Inc. v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982) 9, 11

Cases—Continued Page

Red Hawk v. *Joines*, 129 Or. 620, 278 P. 572 10
Rice v. *Rehner*, No. 82-401 (July 1, 1983) 12, 18, 24
Santa Clara Pueblo v. *Martinez*, 436 U.S. 49 ....12, 13, 14
Swartzel v. *Rogers*, 3 Kan. 374 7
United States v. *Candelaria*, 271 U.S. 432 .....7, 8, 10, 24
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 14
United States v. *Sandoval*, 231 U.S. 28 8
United States v. *Wheeler*, 435 U.S. 313 14
United States ex rel. Hall v. *Hansen*, 303 N.W.2d 349 19
United States ex rel. Mackey v. *Coxe*, 59 U.S. (18 How.) 100 14
Vermillion v. *Spotted Elk*, 85 N.W.2d 432 .....15, 16, 18
Warren Trading Post v. *Arizona Tax Commission*, 380 U.S. 685 23
Washington v. *Yakima Indian Nation*, 439 U.S. 463 .....6, 20, 24, 26, 27
White Mountain Apache Tribe v. *Bracker*, 448 U.S. 136 11
Whiteshield, In re, 124 N.W.2d 694 ..... 17, 18
Whiting v. *Hoffine*, 294 N.W.2d 921 10
Wiley v. *Keokuk*, 6 Kan. 94 7
Williams v. *Lee*, 358 U.S. 217 .....*passim*
Wilson v. *Omaha Indian Tribe*, 442 U.S. 653 14
Worcester v. *Georgia*, 31 U.S. (6 Pet.) 515 8
Yoder v. *Assiniboine & Sioux Tribes*, 339 F.2d 360.. 24

Constitutions, statutes and regulations:

U.S. Const. Amend. XIV (Equal Protection Clause) 4, 5, 26
N.D. Const.:
Art. I, § 9 (previously Art. I, § 22) 4, 15
Art. XIII, § 1 (previously Art. XVI, § 203) ..3, 6, 16
Act of Feb. 27, 1851, ch. 14, Section 7, 9 Stat. 587.. 8
Act of Apr. 9, 1866, ch. 31, Section 1, 14 Stat. 27.. 27
Act of May 31, 1870, ch. 114, Section 16, 16 Stat. 144 27
Act of June 20, 1910, ch. 310, Section 2, 36 Stat. 558 8

Constitutions, statutes and regulations—Continued Page

Act of Aug. 15, 1953 (Public Law 280), ch. 505, 67 Stat. 588 ..... *passim*
Section 4, 67 Stat. 589 (28 U.S.C. (& Supp. V) 1360) 20, 21
Section 4(b), 67 Stat. 589 (28 U.S.C. 1360 (b)) 20
Section 6, 67 Stat. 590 ..... 16, 20, 21
Section 7, 67 Stat. 590 22
Civil Rights Act of 1968, Title IV, Pub. L. No. 90-284, 82 Stat. 78, 25 U.S.C. 1321 *et seq.*:
Section 402(a), 82 Stat. 79, 25 U.S.C. 1322 (a) 17, 22
Section 403(b), 82 Stat. 79, 25 U.S.C. 1323 (b) 22
Enabling Act of Jan. 21, 1861, ch. 20, 12 Stat. 126 7
Enabling Act of Feb. 22, 1889, ch. 180, Section 4, 25 Stat. 676 ..... 4, 6, 7, 9
Indian Reorganization Act, Section 16, 25 U.S.C. 476 1
Public Works and Economic Development Act of 1965, Title I, 42 U.S.C. 3131 3
Trade and Intercourse Act of 1834, ch. 161, 4 Stat. 729 *et seq.*:
Section 12, 4 Stat. 730 8
Sections 17 and 18, 4 Stat. 731 and 732 (now codified at 25 U.S.C. 229 and 230) 2, 11
Rev. Stat. 2116 (1878 ed.) 8
28 U.S.C. (Supp. V) 1331 14
28 U.S.C. 1332 14
28 U.S.C. 1362 24
42 U.S.C. 1981 ..... 5, 7, 26-27
N.D. Cent. Code Ann. (repl. 1978):
§ 27-19-01 ..... 3, 17
§ 27-19-8 18

Constitutions, statutes and regulations—Continued

	Page
Three Affiliated Tribes of the Fort Berthold Reservation, Resolution No. 82-192 (Oct. 22, 1982) amending the Tribal Code:	
Ch. I:	
§ 2.5	3
§§ 3.3 and 3.5	2
Ch. II, § 1(a)	1
Three Affiliated Tribes of the Fort Berthold Reservation, Constitution and Bylaws (June 29, 1936)	1, 2
25 C.F.R. Part 161 (1949)	2
25 C.F.R.:	
Section 11.1(a)	2
Section 11.1(d)	2
Section 11.22	2, 11
Section 11.23(a)	2, 14
Section 11.23(c)	2, 14
Section 11.26	2
Miscellaneous:	
F. Cohen, *Handbook of Federal Indian Law* (1982)	10
112 Cong. Rec. 20769 (1966)	24
114 Cong. Rec. (1968):	
p. 5520	23
p. 9560	23
p. 9596	23
p. 9615	23
22 Fed. Reg. (1957):	
p. 10515	2
pp. 10518-10519	2
Hearing on H.R. 1063 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 83d Cong., 1st Sess. (1953)	23
H.R. Rep. No. 848, 83d Cong., 1st Sess. (1953)	22
H.R. Rep. No. 2040, 89th Cong., 2d Sess. (1966)	24

Miscellaneous—Continued Page

Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs, 90th Cong., 2d Sess. (1968) 23
S. Rep. No. 90-721, 90th Cong., 1st Sess. (1968).... 23
S. Rep. No. 699, 83d Cong., 1st Sess. (1953) 22-23
S. Rep. No. 1507, 89th Cong., 2d Sess. (1966) 24

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 82-629

THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, PETITIONERS

v.

WOLD ENGINEERING, P.C., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

INTEREST OF THE UNITED STATES

The Court invited the Solicitor General to file a brief at the petition stage expressing the views of the United States. The United States traditionally has participated amicus curiae in cases concerning the rights of Indians and Indian Tribes, because of the special obligation of the Federal Government with respect to Indian affairs and, in particular, matters occurring on Indian Reservations for which the Secretary of the Interior has responsibility.

STATEMENT

1. Petitioners, the Three Affiliated Tribes of the Fort Berthold Reservation, are organized under a tribal constitution approved by the Secretary of the Interior pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. 476. The Tribal Code establishes a Fort Berthold Indian Court, which at the time this suit arose had the following jurisdiction over civil matters (ch. II, § 1(a); Pet. 13):

> *Jurisdiction.* The Fort Berthold Indian Court shall have jurisdiction of all suits wherein the defendant is a member of the Three Affiliated Tribes or an Indian over whom the Court has jurisdiction, and of all other suits between members and non-members brought before the Court by stipulation of the parties.[1]

This jurisdictional provision is essentially identical to that contained in Interior Department regulations, first promulgated in 1935 (see 25 C.F.R. Part 161 (1949)) and modified in 1957 (22 Fed. Reg. 10515, 10518-10519), conferring civil jurisdiction on the Courts of Indian Offenses established by the regulations for a number of reservations. 25 C.F.R. 11.1(a) and 11.22. See *Williams* v. *Lee*, 358 U.S. 217, 222 (1959); cf. 25 U.S.C. 229 and 230.[2]

---

[1] On October 22, 1982, after the decision of the Supreme Court of North Dakota in this case, the Tribal Business Council amended the Tribal Code to grant the Tribal Court personal jurisdiction over non-Indians who reside, enter, or transact business within the territorial boundaries of the Reservation and subject matter jurisdiction over all civil causes of action arising within the exterior boundaries of the Reservation. See Resolution 82-192, adding Chapter 1, Sections 3.3 and 3.5, to the Tribal Code. These amendments were approved by the Secretary of the Interior, as required by the Tribal Constitution.

[2] These regulations contain a section governing choice of law in such suits, requiring the application of any laws or regulations of the United States that govern the cause and any ordinances or customs of the tribe not inconsistent with federal law. 25 C.F.R. 11.23(a). Where federal or tribal law does not cover the particular matter, the Courts of Indian Offenses are to apply the law of the State in which the matter in dispute lies. 25 C.F.R. 11.23(c). The regulations also provide for the payment of the judgment out of the Indian defendant's individual funds held by the Secretary if the defendant himself does not satisfy the judgment. 25 C.F.R. 11.26. These regulations continue to apply to any tribe organized under the Indian Reorganization Act until a law and order code has been adopted by the tribe in accordance with its constitution and by-laws and has become effective. 25 C.F.R. 11.1(d).

The choice of law provisions of the recently adopted amendments to petitioners' Tribal Code similarly provide for the applica-

2. Petitioners entered into a contract with respondent Wold Engineering for the design and construction of a water system for the Four Bears Village, located within the exterior boundaries of the Reservation. Wold is a professional corporation organized under the laws of North Dakota with offices located off the Reservation (Pet. 6-7). We have been informed by the Economic Development Administration of the United States Department of Commerce that the project was funded in substantial part by a public works project grant from EDA under Title I of the Public Works and Economic Development Act of 1965, 42 U.S.C. 3131.

After construction of the water system was completed, petitioners brought this action in the District Court for Ward County, North Dakota, claiming that respondent negligently designed the system (Pet. App. 4a-5a). The district court, by judgment order, dismissed the complaint for lack of subject matter jurisdiction (Pet. App. 1a, 3a).

3. The Supreme Court of North Dakota affirmed (Pet. App. 3a-10a). The Supreme Court acknowledged (Pet. App. 5a-6a) that North Dakota courts had exercised jurisdiction over certain civil actions involving Indians on an Indian reservation prior to the enactment of Public Law 280 in 1953.[3] However, the Court concluded that, "pursuant to Public Law 280" (Pet. App. 5a), the State of North Dakota, by a constitutional amendment adopted in 1958 and an implementing statute enacted in 1963,[4] had totally disclaimed jurisdiction over all civil causes of action arising on an Indian Reservation (Pet. App. 5a-7a). The Court also rejected the contention that de-

---

tion of federal law where required and of tribal ordinances, resolutions, and customs, but provide for the application of State law only if agreed to by stipulation of the parties. Tribal Code, ch. 1, § 2.5.

[3] Act of Aug. 15, 1953, ch. 505, 67 Stat. 588.

[4] N.D. Const. Art. XIII, § 1; N.D. Cent. Code Ann. § 27-19-01 (repl. 1978).

nying Indians access to state court to sue non-Indians, even though state courts are open to suits brought by non-Indian plaintiffs against non-Indian defendants concerning matters arising on the Reservation, violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the provision of the North Dakota Constitution providing that the courts of that State shall be open to "every man."[5] The Court explained that because the United States Constitution permits the Federal Government to enact legislation singling out Indian Tribes and because North Dakota's disclaimer of jurisdiction was adopted pursuant to Public Law 280, no equal protection problem arises (Pet. App. 8a-10a).

SUMMARY OF ARGUMENT

A. The Supreme Court of North Dakota has closed the courts of that State to suits by an Indian or Indian Tribe against a non-Indian defendant concerning matters arising on Indian lands, even though such suits are not inconsistent with any federal statute and do not infringe upon the federally protected sovereignty of Indian Tribes. This decision is at odds with the longstanding view of this Court that suits by Indians against non-Indians are fully consistent with established principles governing the exercise of state power over matters affecting Indians and also are consistent with disclaimer clauses, such as those in the North Dakota Enabling Act and Constitution, which provide that Indian lands shall remain under the absolute jurisdiction and control of Congress.

Federal law and tribal sovereignty may operate to preempt state law in certain situations and thereby to confer on Indians and Tribes an immunity from state control. For this reason, suits in state court against an Indian defendant concerning reservation matters, whether brought by an Indian or non-Indian plaintiff, ordinarily are barred. But when an Indian chooses to sue in state

---

[5] N.D. Const. Art. I, § 9; previously Art. I, § 22.

court for redress of wrongs, the State does not improperly impose its jurisdiction on the Indian by entertaining his suit—at least where, as here, the Tribe has not purported to vest exclusive jurisdiction over the matter in a tribal court or other tribunal. The Indian plaintiff has, in these circumstances, cast off whatever protective immunity federal law confers. Indeed, the decisions of this Court have regarded an Indian's access to state court as a basic civil right that he shares with non-Indians.

B. The North Dakota Supreme Court concluded that Public Law 280 authorized the State to disclaim jurisdiction over suits by Indians against non-Indians concerning matters arising on Indian lands, even though such suits were not barred by federal law prior to the enactment of Public Law 280. This conclusion is inconsistent with the text, legislative history, and judicial interpretation of Public Law 280, which make clear that the statute was intended to remove state law impediments to the assumption of *new* jurisdiction by the States, not to authorize them to disclaim jurisdiction that already was authorized by federal law. Even if Public Law 280 could be viewed as ambiguous in this regard, it must be liberally construed, doubtful expressions being resolved in favor of the Indians' longstanding right to sue in state court. In addition, a congressional intent to displace state jurisdiction will not lightly be inferred in any area in which States have long exercised jurisdiction.

C. The North Dakota Supreme Court's construction of the state constitutional and statutory provisions involved was premised on its erroneous view that Public Law 280 supported the disclaimer of jurisdiction it found in these provisions. That Court might well reach a different conclusion as a matter of state law if its misapprehension regarding the scope of Public Law 280 were corrected. Indeed, to bar Indians from access to state courts would raise a substantial question under the Equal Protection Clause of the Fourteenth Amendment and 42 U.S.C. 1981.

ARGUMENT

THE STATE COURT WAS NOT REQUIRED OR AFFIRMATIVELY AUTHORIZED BY FEDERAL LAW TO DISMISS THE SUIT BY PETITIONER TRIBES AGAINST THE NON-INDIAN RESPONDENT FOR LACK OF JURISDICTION

A. State Jurisdiction Is Not Barred By Established Principles Governing The Exercise Of State Power In Matters Affecting Indians

1. The Enabling Act of Feb. 22, 1889 provided for the admission to the Union of North Dakota, as well as Montana, Washington, and South Dakota. Ch. 180, 25 Stat. 676. Section 4 of the Enabling Act required that the constitutions of these States provide, in terms "irrevocable without the consent of the United States and the people of said States," that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." 25 Stat. 677. *Arizona* v. *San Carlos Apache Tribe*, No. 81-2147 (July 1, 1983), slip op. 9; *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 479-481 & n.23 (1979). Consistent with the requirements of the Enabling Act, the disclaimer language in Section 4 of that Act is incorporated in the North Dakota Constitution as part of an Article entitled "Compact with the United States."[6] Pet. App. 6a; compare *Arizona* v. *San Carlos Apache Tribe*, *supra*, slip op. 9. Similar language was included in the Enabling Acts and constitutions of a number of western States. *Id.* at 11, 14 & n.12. Nevertheless, "the presence or absence of specific jurisdictional disclaimers has rarely been dispositive in [this Court's] consideration of state jurisdiction over Indian affairs or activities on Indian lands" (*id.* at 15). Instead, the disclaimers have been viewed essentially as an expression of generally applicable principles governing state jurisdiction in Indian matters (*id.* at 15-17).

---

[6] Art. XIII, § 1; previously Art. XVI, § 203.

As we explain below, this Court consistently has viewed the right of an Indian to have access to state court to sue a non-Indian as a basic civil right that Indians share in common with non-Indians (see also 42 U.S.C. 1981; page 26-27, *infra*), and it repeatedly has made clear that such suits concerning matters arising on Indian lands are fully consistent with accepted principles limiting the exercise by the States of jurisdiction over Indians. For the most part, the Court has reiterated this rule in cases arising in States that have disclaimer clauses in their Enabling Acts and constitutions, thereby establishing that such suits are fully consistent with disclaimer clauses such as those in the North Dakota Enabling Act and Constitution.

In *Felix* v. *Patrick*, 145 U.S. 317 (1892), the Court observed with respect to the Indian plaintiffs: "It is scarcely necessary to say in this connection that, while until [they accepted allotments under the applicable treaty] they were not citizens of the United States, capable of suing as such in the Federal courts, the courts of Nebraska were open to them as they are to all persons irrespective of race or color." 145 U.S. at 332.[7] Three decades later, in *United States* v. *Candelaria*, 271 U.S. 432, 444 (1926), the Court held that a New Mexico state court had jurisdiction to entertain a suit brought by the Indian Pueblo

---

[7] Citing *Blue-Jacket* v. *Commissioners of Johnson County*, 3 Kan. 299 (1865), rev'd on other grounds *sub nom. The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1866); *Swartzel* v. *Rogers*, 3 Kan. 374 (1865); *Wiley* v. *Keokuk*, 6 Kan. 94 (1870).

In *The Kansas Indians*, the Court noted that the Indians there involved, who maintained tribal relations and whose lands were held to be exempt from taxation, "seek the courts of Kansas for the preservation of rights and the redress of wrongs" (72 U.S. (5 Wall.) at 758). As the Court observed (*id.* at 740), the Enabling Act for Kansas contained a disclaimer clause. Act of Jan. 21, 1861, ch. 20, 12 Stat. 126; see *Arizona* v. *San Carlos Apache Tribe*, *supra*, slip op. 15. Although the Court's opinion in *The Kansas Indians* does not disclose the other situations in which Indians had sought redress in state court, the controversy in *The Kansas Indians* itself, brought by Indians in Kansas courts, concerned the lands on which the Indians resided.

of Laguna against non-Indians to quiet title in the Pueblo to land that was subject to restrictions on alienation under the Trade and Intercourse Act of 1834.[8] This was despite the fact, not adverted to by the Court, that the Enabling Act for the admission of New Mexico to the Union required the state constitution to provide that absolute jurisdiction and control of Indian lands, including that of the Pueblo Indians, were to be in the Congress of the United States. Act of June 20, 1910, ch. 310, Section 2, 36 Stat. 558. See *United States* v. *Sandoval*, 231 U.S. 28, 36-38 (1913).

The Court reiterated this rule in *Williams* v. *Lee*, 358 U.S. 217 (1959). There the Court held that an Arizona state court did not have jurisdiction over a suit brought by a non-Indian owner of a store on the Navajo Indian Reservation against two Navajo Indians to collect for goods sold to them on credit; the suit instead had to be brought in the tribal court, which had been granted jurisdiction over suits by outsiders against Indian defendants. 358 U.S. at 222. Yet, even while so ruling, the Court reaffirmed the principle that Indians may sue outsiders in state court (*id.* at 219-220, citing *Felix* v. *Patrick* and *United States* v. *Candelaria*, *supra*), and it did so while acknowledging that the State of Arizona, where the case arose, is subject to an express disclaimer of jurisdiction over Indian lands in its Enabling Act and state constitution (358 U.S. at 223 n.10; Act of June 20, 1910, ch. 310, 36 Stat. 569).

The Court observed in *Williams* v. *Lee* that the "broad principles" of *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832)—which the Court characterized as an instance in which the State of Georgia "sought to impose [its] laws and courts on the Indians" (358 U.S. at 218)—have come to be accepted as law (*id.* at 219). But the Court explained that within these broad principles, state jurisdic-

[8] Rev. Stat. 2116 (1878 ed.), Trade and Intercourse Act of 1834, ch. 161, Section 12, 4 Stat. 730, as extended to New Mexico by the Act of Feb. 27, 1851, ch. 14, Section 7, 9 Stat. 587.

tion has been recognized "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized"; "absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them" (*id.* at 219, 220). Suits by Indians against non-Indians in state courts were cited as an example of the exercise of state jurisdiction that did not infringe on that right. *Id.* at 219. Moreover, by citing for this proposition not only *Felix* v. *Patrick*, but also *Harrison* v. *Laveen*, 67 Ariz. 337, 196 P.2d 456 (1948)—which held that Indians have a right to vote in Arizona—the Court in *Williams* v. *Lee* again viewed the right of access to state courts as a fundamental right that Indians share in common with all other persons in the State.

The Court reaffirmed these principles once again in *McClanahan* v. *Arizona State Tax Commission*, 411 U.S. 164 (1973). The Court there held that the State of Arizona could not tax the reservation income of an Indian residing on the Navajo Reservation. But the Court nevertheless twice reiterated that suits by Indians against outsiders in state court are consistent with the principles announced in *Williams* v. *Lee* governing the accommodation of federal, state, and tribal jurisdiction on an Indian reservation (411 U.S. at 171, 173), even while acknowledging the disclaimer of jurisdiction over Indian lands contained in the Enabling Act for Arizona and other States (*id.* at 175-176 & n.14). Indeed, *McClanahan* itself was a suit filed by an Indian in state court in a disclaimer State concerning matters arising on the Reservation, and the propriety of the exercise of jurisdiction by the state courts was never questioned, even though the tax at issue was struck down. See also *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, No. 80-2162 (July 2, 1982); *The Kansas Indians*, *supra*.

Moreover, the Court in *McClanahan* once again viewed the right of access to state courts as a right that In-

dians share along with other citizens of the State, just like the right of Indians to vote[9] and to receive some state services. 411 U.S. at 172-173. See also *Poafpybitty* v. *Skelly Oil Co.*, 390 U.S. 365, 371 (1968), quoting *Choctaw & Chickasaw Nations* v. *Seitz*, 193 F.2d 456, 459 (10th Cir. 1951) (noting that *Candelaria* and other decisions "clearly recognized the rights of restricted Indians and Indian tribes or pueblos to maintain actions with respect to their lands"); 390 U.S. at 370-371, quoting *Brown* v. *Anderson*, 61 Okla. 136, 138-139, 160 P. 724, 726 (1916)[10]; *Bonnet* v. *Seekins*, 126 Mont. 24, 243 P.2d 317 (1952).

The supreme courts of other States also have recognized the right of Indians, like other citizens, to have access to state courts to bring suits against non-Indians concerning matters arising on a reservation. *Whiting* v. *Hoffine*, 294 N.W.2d 921, 923-924 (S.D. 1980); *McCrea* v. *Busch*, 164 Mont. 442, 524 P.2d 781 (1974); *Paiz* v. *Hughes*, 76 N.M. 562, 417 P.2d 51 (1966); *Red Hawk* v. *Joines*, 129 Or. 620, 278 P. 572 (1929). See also *Johnson* v. *Kerr-McGee Oil Industries, Inc.*, 129 Ariz. 393, 395, 631 P.2d 548, 550 (Ct. App.), cert. denied, 454 U.S. 1025 (1981); F. Cohen, *Handbook of Federal Indian Law* 351, 355 (1982).[11]

2. This Court's cases establish that, absent an Act of Congress so providing, reservation Indians may not be

---

[9] Once again citing *Harrison* v. *Laveen*, *supra*. See 411 U.S. at 173 & n.10.

[10] "Osborne Anderson, the defendant in error, although a full blood Indian, was a citizen of the United States and of the State of Oklahoma. No good reason appears why he should be denied the privilege of appealing to the courts of the state the same as any other citizen to enforce his rights to property, even though such property be land upon which restrictions against alienation have been imposed by an act of Congress."

[11] The legal principles announced in *Williams* v. *Lee* regarding jurisdiction over suits between Indians and non-Indians also were reiterated in *Fisher* v. *District Court*, 424 U.S. 382, 386 (1976), and *Kennerly* v. *District Court*, 400 U.S. 423, 426-427 (1971).

sued in state court for matters arising on the reservation, because to do so would interfere with the right of tribal self-government—especially where, as in *Williams* v. *Lee*, the tribal court has jurisdiction over such disputes. See also *Fisher* v. *District Court*, 424 U.S. 382, 383, 386-389 (1976); *Kennerly* v. *District Court*, 400 U.S. 423, 425 (1971). The state courts may not "impose their * * * courts on the Indians" in this fashion (*Williams* v. *Lee*, *supra*, 358 U.S. at 218), which might "jeopardize[]" the rights of Indians by permitting them to be haled into often hostile state courts (*id.* at 219). This policy of deference to the mechanisms adopted by the tribes—or by the Secretary on their behalf (25 C.F.R. 11.22)—for the redress of grievances against tribal members is of long standing, as reflected in Sections 17 and 18 of the Trade and Intercourse Act of 1834 (ch. 161, 4 Stat. 731 and 732), now codified at 25 U.S.C. 229 and 230.

The test under *Williams* v. *Lee* and related cases for determining whether the exercise of jurisdiction by state courts over causes of action arising on an Indian reservation is preempted—*i.e.*, whether there is governing federal legislation and, if not, whether the state action would infringe on the right of reservation Indians to make their own laws and to be ruled by them—is essentially the same as the preemption test applied by this Court in Indian cases generally. In other cases, the Court has recognized two " 'independent but related' barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be preempted by federal law, or it may interfere with the Tribe's ability to exercise its sovereign functions." *Ramah Navajo School Board, Inc.* v. *Bureau of Revenue*, *supra*, slip op. 4-5, quoting *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 142 (1980). In discussing these principles last Term, the Court noted that federal statutes or tribal sovereignty may establish an "immunity" or "sovereign immunity" from the application of state law, preventing the "imposition" of that law

upon the Indians. *Rice* v. *Rehner*, No. 82-401 (July 1, 1983), slip op. 6, 7, 8, 12. See also *New Mexico* v. *Mescalero Apache Tribe*, No. 82-331 (June 13, 1983), slip op. 8, quoting *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 152 (1973) ("'historic immunity from state and local control'"). So also, under *Williams* v. *Lee* and its progeny, federal law or principles of inherent tribal sovereignty may preempt the exercise of jurisdiction by state courts, and thus confer a protective "immunity" from the coercive "imposition" of that jurisdiction over Indians concerning matters on the reservation.

But, at the same time, as we have explained, this Court's cases also consistently have recognized the right of an Indian to sue a non-Indian in state court. This implements the principles of *Williams* v. *Lee* and this Court's preemption cases generally. When an Indian voluntarily invokes the jurisdiction of the state court, the State does not "impose" its courts on the Indians. Although it is true that the state might be hostile to the Indian's position when he is the plaintiff, just as when he is the defendant, the Indian plaintiff who submits his cause to the state courts may be said to have cast off his "immunity" from the jurisdiction of those courts concerning on-reservation matters and voluntarily accepted the risk of a hostile reception. And at least where the tribe has not sought to exercise its inherent sovereign powers by conferring exclusive jurisdiction on its tribal courts over suits by Indians against non-Indians with regard to contract disputes or similar reservation matters affecting the tribe or its members (see *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 65 (1978); *Montana* v. *United States*, 450 U.S. 544, 565-566 (1981); *Merrion* v. *Jicarilla Apache Tribe*, 455 U.S. 130, 138 (1982)), the exercise of jurisdiction by the state courts does not impermissibly interfere with tribal sovereignty or self-government.[12]

---

[12] When this case was filed and when the district court's dismissal for lack of jurisdiction was affirmed, the Tribal Court

This is especially so, as in the instant case, when it is the tribe itself that has brought the action in state court. In such a case, the tribe may be held to have determined for itself that submitting the matter to state court is consistent with tribal interests. Indeed, the ability of a tribe to bring suit to recover for damage to important reservation facilities caused by outsiders substantially *furthers* the interests of tribal sovereignty. "Indians are entitled 'to take their place as independent qualified members of the modern body politic.' *Poafpybitty* v. *Skelly Oil Co.*, *supra*, 390 U.S. at 369, quoting *Board of County Commissioners* v. *Seber*, 318 U.S. 705, 715 (1943). Accordingly, the Indians' participation in litigation critical to their welfare should not be discouraged." *Arizona* v. *California*, No. 8, Orig. (Mar. 30, 1983), slip op. 8.

Moreover, unlike in the case of claims *against* Indians, for which an Act of Congress and Interior Department regulations embody a policy of deference to tribal mechanisms for their resolution (see page 11 & note 2, *supra*), there are no federal statutes or regulations that reflect a comparable policy that could be said to preclude suits

---

did not have jurisdiction over civil actions brought against non-Indians, except by stipulation of the parties. The October 22, 1982 amendment to the Tribal Code giving the Tribal Court jurisdiction over suits against non-Indians arising on the Reservation does not suggest that this jurisdiction was intended to be exclusive, rather than concurrent with that of the state courts. There thus is no occasion in this case to consider the circumstances under which an assertion by the Tribe of exclusive jurisdiction over certain controversies would oust state courts of jurisdiction. Cf. *Kennerly* v. *District Court*, *supra*, 400 U.S. at 425-426. Compare *Fisher* v. *District Court*, *supra*, 424 U.S. at 384 n.5, 389; see also *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 59-60, 65. In *Kennerly*, the governing statutes regarding the assumption by a State of civil jurisdiction—Public Law 280 and Title IV of the Civil Rights Act of 1968—did not permit the suit against Indians in state court there at issue (400 U.S. at 427-429), irrespective of whether such a suit would impermissibly infringe upon tribal self-government in light of the tribal ordinance recognizing concurrent jurisdiction in the tribal and state courts over suits against Indians (*id.* at 425).

by Indians against non-Indians in state court. And where the tribal court does not have jurisdiction of the matter, the effect of a holding that the state courts likewise do not have jurisdiction would be to deprive the Indian plaintiff of any forum for resolution of the matter, unless the contract or other dispute could be said to arise under federal law for purposes of federal question jurisdiction under 28 U.S.C. (Supp. V) 1331 [13] or unless the requirements for federal diversity jurisdiction were satisfied, 28 U.S.C. 1332. In the present case, for example, the Tribal Court did not have jurisdiction over the Tribes' dispute with respondent either when the complaint was filed or when the dismissal for lack of jurisdiction was affirmed by the North Dakota Supreme Court. By contrast, in *Fisher* v. *District Court*, *Kennerly* v. *District Court*, and *Williams* v. *Lee*, the result of the decision

---

[13] A suit brought to enforce rights conferred by tribal law would not appear to be one arising under federal law for purposes of the jurisdiction of federal district courts under 28 U.S.C. (Supp. V) 1331. See *Gila River Indian Community* v. *Henningson*, 626 F.2d 708, 714-715 (9th Cir. 1980), cert. denied, 451 U.S. 911 (1981); see also *Mescalero Apache Tribe* v. *Martinez*, 519 F.2d 479 (10th Cir. 1975). Cf. *United States* v. *Wheeler*, 435 U.S. 313 (1978); but cf. *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 682 n.16 (1974). There is, however, no reason why state courts may not apply tribal substantive law in suits within their jurisdiction. See, *e.g.*, *Jones* v. *Meehan*, 175 U.S. 1, 28-32 (1899); *United States ex rel. Mackey* v. *Coxe*, 59 U.S. (18 How.) 100 (1855). Cf. 25 U.S.C. 1322(c); *Santa Clara Pueblo* v. *Martinez*, *supra*, 436 U.S. at 66 n.21, citing *United States ex rel. Mackey* v. *Coxe*, *supra*.

It also is not clear to what extent, if any, the instant suit would be governed by federal law, by virtue of the participation by the Economic Development Administration in the project. *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715, 726-727 (1979); cf. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 670-671 (1979). Of course, even if federal law applied because of substantial federal involvement in the Indian transaction at issue, the applicable federal rule of decision might in appropriate circumstances be adopted from tribal or state law. *United States* v. *Kimbell Foods, Inc.*, *supra*, 440 U.S. at 727-740; *Wilson* v. *Omaha Indian Tribe*, *supra*, 442 U.S. at 671-676. Cf. 25 C.F.R. 11.23(a) and (c); note 2, *supra*.

barring state court jurisdiction was not to deny a forum for the lawsuit, because the tribal court did have jurisdiction over the matter in controversy.

B. Public Law 280 Did Not Authorize The State Of North Dakota To Disclaim Jurisdiction That Previously Had Not Been Barred By Federal Law

1. As we have explained in Point A, this Court repeatedly has made clear that a state court is not barred from entertaining a suit brought by an Indian plaintiff against a non-Indian defendant arising out of matters occurring on an Indian reservation or other Indian lands. Such suits are fully consistent with established principles limiting the power of the States to impose their laws on Indians and with the disclaimer clauses implementing that tradition, such as those in the North Dakota Enabling Act and State Constitution of 1889.

Indeed, the North Dakota Supreme Court acknowledged in this case that it too previously had held that the courts of North Dakota retained residuary jurisdiction over suits brought by Indians concerning certain matters arising on Indian reservations, notwithstanding the disclaimers in its Enabling Act and 1889 Constitution (Pet. App. 6a, citing *Vermillion* v. *Spotted Elk*, 85 N.W.2d 432 (N.D. 1957)). In *Vermillion*, the court had relied on Article I, Section 22 of the North Dakota Constitution (now Art. I, § 9), which provides that the courts of the State shall be open to "every man" (85 N.W.2d at 438), and had acknowledged the general rule in other States that Indians, as citizens, have a right to sue in state court (*id.* at 436-438).[14] But the court held

---

[14] In *Vermillion*, the Supreme Court of North Dakota held that it had jurisdiction over a suit by one Indian against another for damages arising out of an automobile accident on the Standing Rock Indian Reservation. The Court held that the suit was not barred by the disclaimer clauses in the Enabling Act and State Constitution, on the ground that these clauses do not bar suits that do not have any relation to Indian lands (85 N.W.2d at 437, 438). The particular holding in *Vermillion* could not survive this Court's

that a different result was required in this case because of an intervening amendment to the disclaimer clause in the North Dakota Constitution and a state statute implementing that constitutional amendment—both of which, according to the North Dakota Supreme Court, were adopted "[u]nder the authority of Public Law 280" (Pet. App. 6a, 7a).

In Section 6 of Public Law 280, Congress provided that, "[n]otwithstanding the provisions of any Enabling Act for the admission of a State," the consent of the United States is given to the people of any State to amend its State constitution or statutes "to remove any legal impediment to the assumption of civil and criminal jurisdiction" in Indian country. 67 Stat. 590. The 1958 amendment to the State Constitution, relied upon by the North Dakota Supreme Court, retained the original disclaimer clause representing that "Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States." The 1958 amendment simply added a proviso to that language stating "that the legislative assembly of the state of North Dakota may, upon such terms and conditions as it shall adopt, provide for the acceptance of such jurisdiction as may be delegated to the state by Act of Congress * * *." See Pet. App. 6a-7a.[15] In 1963, "under the authority of Public Law 280" and the amendment to the State Constitu-

---

subsequent decisions in *Williams* v. *Lee*, *Kennerly* v. *District Court*, and *Fisher* v. *District Court*, *supra*, because the resolution of disputes between tribal members that arise on the reservation is at the core of the right of tribal self-government with which a State may not interfere. However, the rule that suits in state courts between Indians concerning matters arising on the reservation are barred in these circumstances does not undermine the force of the reasoning in *Vermillion* that state courts must remain open to exercise jurisdiction over suits by Indians that are *not* preempted by federal law because they are not inconsistent with the overriding federal policy of preserving tribal sovereignty or with a federal statute (such as a disclaimer clause) barring such jurisdiction.

[15] Art. XIII, § 1; previously Art. XVI, § 203.

tion (Pet. App. 7a), the North Dakota legislature amended the State's Civil Code to provide for what was entitled the "Assumption of Jurisdiction." N.D. Cent. Code Ann. § 27-19-01 (repl. 1978). This section of the Code states:

> In accordance with the provisions of Public Law 280 of the 83rd Congress and section 203 of the North Dakota constitution, jurisdiction of the State of North Dakota shall be extended over all civil causes of action which arise on an Indian reservation upon acceptance by Indian citizens in a manner provided in this chapter.

2. The North Dakota Supreme Court concluded in this case that by the amendment to the disclaimer clause of the State Constitution and the enactment of the implementing state statute, "the people and the legislature of the State have taken affirmative action which amounts to a complete disclaimer of jurisdiction over civil causes of action which arise on an Indian reservation, except upon acceptance by the Indian citizens of the reservation in the manner provided by the legislative enactment" (Pet. App. 7a, quoting *In re Whiteshield*, 124 N.W.2d 694, 696 (N.D. 1963)). Accordingly, because the petitioner Tribes have not formally accepted state jurisdiction,[16] the Court held (Pet. App. 7a) that any jurisdiction over civil causes of action that previously had existed in the North Dakota courts had been withdrawn (*ibid.*).

This conclusion is difficult to square with the text of the state constitutional and statutory provisions involved. The 1958 amendment to the North Dakota Constitution retained the standard disclaimer language that, as we have shown in Point A, does not bar suits by Indians against non-Indians in state court. The 1958 amendment simply added a proviso to this disclaimer, which itself suggests that the amendment was intended only to *limit* the reach of the disclaimer clause, not expand

---

[16] Such tribal consent now also is required by 25 U.S.C. 1322(a), enacted as part of the Civil Rights Act of 1968, Pub. L. No. 90-284, Section 402(a), 82 Stat. 79.

it. Moreover, the proviso speaks of the "acceptance" by the state legislature of jurisdiction that may be "delegated" to the State by Congress. This language bespeaks an intent to establish a procedure for the receipt of new jurisdiction conferred by Congress that previously was foreclosed by federal law, not to disclaim previously existing state jurisdiction. State court jurisdiction to entertain suits by Indians against non-Indians was not "delegated" by Congress in Public Law 280 (compare *Rice* v. *Rehner*, *supra*, slip op. 17-18); it is an aspect of state power that never was displaced by the disclaimer clauses or other federal laws or policies.

Similarly, the state statute implementing the proviso to the disclaimer clause provides that, "[i]n accordance with the provisions of Public Law 280" and the state constitutional provision, state civil jurisdiction shall be "extended" to "all civil causes of action" arising on Indian reservations upon the consent of the Indians. This language suggests only the possible acquisition of *additional* jurisdiction, so that state jurisdiction would be all-inclusive. There is no suggestion in the statute of an intent to withdraw any preexisting state court jurisdiction.[17]

---

[17] The Court explained in the instant case (Pet. App. 7a) that following the amendment to the disclaimer clause in the State Constitution, the Court had overruled *Vermillion* v. *Spotted Elk*, *supra*, in *In re Whiteshield*, *supra*. The latter case involved an action in state court for the termination of parental rights where all the parties were Indians—a suit, like *Vermillion* itself, over which state court jurisdiction was preempted by federal law because such jurisdiction would interfere with tribal sovereignty. Cf. *Fisher* v. *District Court*, *supra*. Consistent with this federally imposed limitation on state jurisdiction that could be overcome only by compliance with Public Law 280, the North Dakota Civil Code provisions implementing Public Law 280 stated that the "civil jurisdiction herein accepted" by the State (when approved by the Indians) shall include the determination of parental rights. The Court relied upon this state statutory provision in *In re Whiteshield* (124 N.W.2d at 698, quoting N.D. Cent. Code Ann. § 27-19-8 (repl. 1978)), and quite properly viewed such jurisdiction as completely disclaimed by the State until formally accepted by it pursuant to Public Law 280. But this conclusion does not support the North Dakota Supreme

3. The holding by the North Dakota Supreme Court in this case also cannot be squared with the text and purposes of Public Law 280. Because the North Dakota Supreme Court explicitly held that the state constitutional amendment and implementing statute were adopted "[u]nder the authority of Public Law 280" (Pet. App. 6a, 7a), the Court's holding that the constitutional amendment and statute effected a complete disclaimer of jurisdiction over the instant suit necessarily rests on the premise that Public Law 280 authorized such a disclaimer. This premise is mistaken. There is no indication that in enacting Public Law 280, Congress intended to oust state courts of any jurisdiction—such as that over suits by Indians against non-Indians—which theretofore was not barred by federal law. Nor is there any indication that Congress intended Public Law 280 to be an affirmative authorization for the States, in their discretion, to close their courts to suits by their Indian citizens

---

Court's holding in this case that state jurisdiction that was *not* barred by the state constitutional disclaimer before the proviso was added (or by other federally imposed limitations) also was disclaimed by constitutional amendment and implementing statute. As explained in the text, the terms of the amendment and statute would appear to be addressed only to the acceptance of additional jurisdiction by the State.

Two other of the prior decisions of the North Dakota Supreme Court cited in the decision below (Pet. App. 7a) as precedent for its holding that the state court did not have jurisdiction in this case involved suits against Indians arising out of on-reservation activities that likewise would be barred by federal law, under the rationale of *Williams* v. *Lee* and *Kennerly* v. *District Court*. See *Nelson* v. *Dubois*, 232 N.W. 2d 54 (N.D. 1975), and *Gourneau* v. *Smith*, 207 N.W. 2d 256 (N.D. 1973). It apparently was not until 1981 that the North Dakota Supreme Court had occasion to consider whether an Indian could sue a non-Indian in state court with respect to a matter arising on the reservation. *See United States ex rel. Hall* v. *Hansen*, 303 N.W. 2d 349 (N.D. 1981), in which the court held that such a suit could not be brought. Even then, the issue arose in the context of whether the trial court could consider the counterclaim filed by the non-Indian defendant against the Indian plaintiff after the Indian plaintiff withdrew his complaint (*id.* at 350).

and tribes where such suits are not independently barred by federal law or would not impermissibly infringe upon the federally protected sovereignty of the Tribes. To the contrary, as we explain below, the entire thrust of Public Law 280 was to facilitate the assumption of new jurisdiction by the States.

a. The text of Public Law 280 does not support the decision of the North Dakota Supreme Court in this case. Section 4 of the Act provided that each of five named States[18] would immediately have civil jurisdiction "over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country * * * to the same extent that such State * * * has jurisdiction over other civil causes of action * * *." Act of Aug. 15, 1953, 67 Stat. 589, 28 U.S.C. (& Supp. V) 1360. Obviously, Section 4 did not oust these five States of any jurisdiction or authorize them to disclaim jurisdiction over the very areas of Indian country in which Congress intended them to have *complete* civil jurisdiction automatically upon the passage of Public Law 280.[19]

North Dakota was not one of the five States for which an automatic vesting of all civil jurisdiction was accomplished by Section 4 of Public Law 280. Instead, because of the disclaimer clause in its Enabling Act and State Constitution, North Dakota is governed by Section 6 of Public Law 280 (67 Stat. 590),[20] which provides:

> Notwithstanding the provisions of any Enabling Act for the admission of a State, the consent of the United States is hereby given to the people of any State to amend, where necessary, their State constitution or existing statutes, as the case may be,

---

[18] California, Minnesota, Nebraska, Oregon, and Wisconsin. Alaska later was added to the list.

[19] Subsection (b) of Section 4, 28 U.S.C. 1360(b), contains certain limitations on the exercise of state civil jurisdiction, but those limitations are not at issue here.

[20] See *Washington* v. *Yakima Indian Nation*, *supra*, 439 U.S. at 474.

> to remove any legal impediment to the assumption of civil and criminal jurisdiction in accordance with the provisions of this Act: *Provided*, That the provisions of this Act shall not become effective with respect to such assumption of jurisdiction by any such State until the people thereof have appropriately amended their State constitution or statutes as the case may be.

Nothing in this Section suggests a congressional intent to oust the States of jurisdiction that theretofore had not been barred by federal law or to authorize the States to disclaim any such jurisdiction. Section 6 speaks instead of the "assumption" of jurisdiction—which connotes a transfer of *new* jurisdiction from the federal government to the States—and the removal of "impediments" to that assumption contained in the Enabling Act or state constitution. The purpose of Section 6 was to provide a mechanism whereby States such as North Dakota could place themselves on an equal footing with the five States that acquired jurisdiction automatically under Section 4 of the Act, which, as we have explained, clearly did not permit the affected States to disclaim jurisdiction.

In addition, as we also have explained (see pages 7-10, *supra*), the disclaimer clauses in the Enabling Acts and state constitutions of North Dakota and other states were not "impediments" to the exercise of jurisdiction by state courts over civil suits brought by Indians against non-Indians with respect to matters arising on a reservation. The authorization in Section 6 of Public Law 280 for States to remove disclaimer clause "impediments" therefore was not necessary for these States to continue to exercise that jurisdiction. As a result, Section 6, the section of Public Law 280 applicable to North Dakota, has no bearing on the issue in this case. That provision plainly did not diminish State jurisdiction; nor can Section 6 be read as an affirmative authorization for a State to adopt new impediments to the exercise of jurisdiction.

The foregoing interpretation of Section 6 is reinforced by Section 7 of Public Law 280 (67 Stat. 590), which provided that as to the other "option" States, for which there is not a disclaimer in the Enabling Act or state constitution (*ibid.*; emphasis added):

> The consent of the United States is hereby given to any other State *not having jurisdiction* with respect to * * * civil causes of action * * * as provided for in this Act, to assume jurisdiction at such time and in such manner as the people of the State, shall, by affirmative legislative action, obligate and bind the State to assumption thereof.

Once again, this provision addressed only those situations in which the States did not already have jurisdiction. Section 7 of Public Law 280 was repealed by Section 403(b) of the Civil Rights Act of 1968, Title IV, Pub. L. No. 90-284, 82 Stat. 79, 25 U.S.C. 1323(b). However, 25 U.S.C. 1322(a), enacted as Section 402(a) of the Civil Rights Act of 1968 (82 Stat. 79)—which now governs the assumption of jurisdiction by all States, including North Dakota, that had not acquired jurisdiction pursuant to Public Law 280 prior to 1968—is written in similar terms that grant the consent of the United States to any State "not having jurisdiction" over civil causes of action to assume such jurisdiction. There is no expression of an intent to disturb state jurisdiction that already was permissible under federal law.

b. Nor does the legislative history of Public Law 280 support the interpretation given the Act by the North Dakota Supreme Court. That history repeatedly refers to the Act as providing for an "extension" or "transfer" of civil jurisdiction to the States, thereby confirming Congress' purpose to facilitate an assumption of *new* jurisdiction by the States. See, *e.g.*, H.R. Rep. No. 848, 83d Cong., 1st Sess. 6, 7 (1953)[21]; S. Rep. No. 699, 83d

---

[21] The House Report also refers (*id.* at 5, 7) to civil jurisdiction "over Indians," which suggests jurisdiction in suits in which Indians are *defendants*.

Cong., 1st Sess. 5-7 (1953); *Hearing on H.R. 1063 Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 13, 17, 18, 22 (June 29, 1953) (unpublished, but lodged with the Clerk of this Court); *id.* at 1, 11 (July 15, 1953).[22]

This Court's decisions likewise describe Public Law 280 as designed to accomplish a transfer of jurisdiction to, and assumption of jurisdiction by, the States. See, *e.g.*, *Williams* v. *Lee*, *supra*, 358 U.S. at 222-223; *Warren Trading Post* v. *Arizona Tax Commission*, 380 U.S. 685, 687 n.3 (1965); *Kennerly* v. *District Court*, *supra*, 400 U.S. at 427, 428, 429[23]; *McClanahan* v. *Arizona State Tax Commisison*, *supra*, 411 U.S. at 177-178; *Fisher* v. *Dis-*

---

[22] This same view is reflected in the legislative history of the Civil Rights Act of 1968, which amended Public Law 280. See, *e.g.*, S. Rep. No. 90-721, 90th Cong., 1st Sess. 32 (1968) (additional views of Senator Ervin); *Rights of Members of Indian Tribes: Hearing on H.R. 15419 and Related Bills Before the Subcomm. on Indian Affairs of the House Comm. on Interior and Insular Affairs*, 90th Cong., 2d Sess. 25 (1968) (referring to tribal consent requirement to assumption of jurisdiction to ensure that Indians are not "subjected" to state courts before they are ready); *id.* at 27, 32, 38, 91 (discussing *Paiz* v. *Hughes*, *supra*, in which an Indian sued a non-Indian), 104, 108-109, 115-116, 120-121, 133; 114 Cong. Rec. 9560, 9596, 9615 (1968), *id.* at 5520 (Presidential message).

[23] In *Kennerly*, the Court observed that at the time the case arose, "[w]ith regard to the particular question of the extension of state jurisdiction over civil causes of action by or against Indians arising in Indian country," there was a governing Act of Congress, Public Law 280. 400 U.S. at 427, quoted in *Bryan* v. *Itasca County*, 426 U.S. 373, 386 (1976). *Kennerly*, however, involved a suit against an Indian by a non-Indian. The reference to suits brought *by* Indians therefore was dictum, even assuming that it was made with reference to the type of suit involved here. There was, moreover, no reference in *Kennerly* to the prior cases sustaining state jurisdiction over suits brought by Indians against non-Indians. In addition, it would be inconsistent with the Court's use of the phrase "extension of state jurisdiction" to read the passage in the Court's opinion to suggest that Congress withdrew then-existing jurisdiction over certain causes of action until the new procedural requirements of Public Law 280 were satisfied.

trict Court, supra, 424 U.S. at 388, 389; *Bryan* v. *Itasca County*, 426 U.S. 373, 381, 385, 386 (1976); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 475, 483, 484, 485, 486 & n.29, 490, 491, 492 n.36, 493, 495, 497, 499 (1979); *Arizona* v. *San Carlos Apache Tribe, supra*, slip op. 13. Cf. *Rice* v. *Rehner, supra*, slip op. 20 n.17.

It would be inconsistent with the purpose of Public Law 280 of facilitating the exercise by the States of jurisdiction over all civil causes of action arising on Indian reservations [24] to interpret that law to impose or authorize a new impediment to the exercise of jurisdiction over suits that state courts already were permitted by federal law to entertain. Cf. *Rice* v. *Rehner, supra*, slip op. 9. Indeed, in *Williams* v. *Lee* and *McClanahan* v. *Arizona State Tax Commission, supra*, in which Public Law 280 was specifically discussed, the Court reiterated the long established rule, drawn from *Felix* v. *Patrick* and *United States* v. *Candelaria, supra*, that Indians may sue non-Indians in state court, without any suggestion that the enactment of Public Law 280 had withdrawn that jurisdiction from the States or authorized the States to disclaim it.[25]

But even if the civil jurisdiction provisions of Public Law 280 were thought to be ambiguous with regard to their effect on suits by Indians against non-Indians, this Court has made clear that the construction of Public Law

---

[24] See *Washington* v. *Yakima Indian Nation, supra*, 439 U.S. at 490-491.

[25] Similarly, when Congress enacted 28 U.S.C. 1362 in 1966 to give federal courts jurisdiction over suits by recognized Tribes arising under federal law without regard to the amount in controversy, the assumption was that such suits otherwise would be brought in state court, if at all. S. Rep. No. 1507, 89th Cong., 2d Sess. 2-3 (1966); H.R. Rep. No. 2040, 89th Cong., 2d Sess. 2-3 (1966); 112 Cong. Rec. 20769 (1966). It is instructive that the suit cited in the legislative history as an example of the type of suit for which the statute was designed, *Yoder* v. *Assiniboine & Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964), arose in Montana, a disclaimer state, after the enactment of Public Law 280.

280 is to be "guided by that 'eminently sound and vital canon,' *Northern Cheyenne Tribe* v. *Hollowbreast*, 425 U.S. 649, 655 n.7 (1976), that 'statutes passed for the benefit of dependent Indian tribes * * * are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78, 89 (1918)." *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 392. Without a clear expression of congressional intent, Public Law 280 cannot, consistent with this principle of statutory construction, be interpreted to authorize the abrogation of the fundamental and long-recognized right, possessed by Indians along with non-Indians, to have access to state courts for redress of wrongs. See *Bryan* v. *Itasca County*, *supra*, 426 U.S. at 382.

C. A Construction Of The State Constitutional And Statutory Provisions That Barred State Court Jurisdiction Over A Suit By An Indian Against A Non-Indian Would Raise A Substantial Constitutional Question

The holding by the North Dakota Supreme Court that the people and legislature of the State have disclaimed jurisdiction over suits such as that at issue here rested on its view that Public Law 280 authorized that disclaimer. Accordingly, it is entirely possible that the Supreme Court of North Dakota, on remand, would construe the proviso to the state constitutional disclaimer and the state statute implementing that proviso not to bar jurisdiction over the instant case if this Court were to hold, as we submit, that Public Law 280 did not authorize the State to disclaim that jurisdiction. The Supreme Court also might be led to that view by a reaffirmation by this Court of its longstanding view that such suits are fully consistent with established limitations on the exercise of state authority over Indians and with disclaimer clauses such as those applicable to North Dakota, and that the right of access to state courts is a

basic civil right that Indians share in common with non-Indians.

Indeed, a contrary construction of the state constitution and implementing statute would, in our view, raise a substantial question under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The effect of such a holding would be that a State may deprive Indians of the fundamental right of access to state courts without any authorization given by the federal government in furtherance of an overriding federal policy regarding Indian affairs that might make an ouster of state jurisdiction appropriate. Compare *Plyer* v. *Doe*, 457 U.S. 202, 219 n.19, 224-226 (1982).

In *Washington* v. *Yakima Indian Nation*, *supra*, the Court reaffirmed that the unique legal status of Indian Tribes under federal law permits the federal government to enact legislation singling out Indian Tribes, even though that legislation might otherwise be constitutionally infirm. 439 U.S. at 500-501, citing *Morton* v. *Mancari*, 417 U.S. 535, 551-552 (1974). The Court stressed, however, that "States do not enjoy this same unique relationship with Indians" (439 U.S. at 501). The Court sustained the state jurisdictional statute there at issue because the Court found that it was enacted in response to Public Law 280 and was within the scope of the authorization granted by that law. 439 U.S. at 501. In this case, by contrast, Public Law 280 did not purport to authorize the State of North Dakota to disclaim any pre-existing jurisdiction over suits by Indians against non-Indians. Nor did the Supreme Court of North Dakota articulate any independent state policy in support of barring access to state courts by Indians to sue non-Indians who otherwise are amenable to suit in the courts of the State. Moreover, quite aside from the question it raises under the Equal Protection Clause, the decision of the Supreme Court of North Dakota would appear to conflict with 42 U.S.C. 1981, which provides: "All persons

within the jurisdiction of the United States shall have the same right in every State and Territory * * * to sue * * * as is enjoyed by white citizens." [26]

The Court may wish to refrain from resolving these difficult questions here, however, since the interpretation below of the state constitutional and statutory provisions was premised on an erroneous understanding of the scope of Public Law 280. This misinterpretation affected the North Dakota Supreme Court's disposition of the constitutional question as well: that Court relied upon *Washington* v. *Yakima Indian Nation*, *supra*, for the proposition that there was no equal protection violation because Congress, in Public Law 280, authorized the state to disclaim jurisdiction over the case (see Pet. App. 9a). And, finally, the North Dakota Supreme Court did not discuss the impact of 42 U.S.C. 1981. The Court therefore may wish to remand for further proceedings on these questions and to provide the Supreme Court of North Dakota with an opportunity to reconsider the meaning of the state constitutional and statutory provisions with further guidance regarding the backdrop of applicable federal law.

---

[26] As first enacted in Section 1 of the Act of Apr. 9, 1866, ch. 31, 14 Stat. 27, this protection applied only to persons whom that Section declared to be citizens, from which "Indians not taxed" were excluded. This exclusion was not carried forward in Section 16 of the Act of May 31, 1870, ch. 114, 16 Stat. 144, from which 42 U.S.C. 1981 is derived.

CONCLUSION

The judgment of the Supreme Court of North Dakota should be vacated insofar as it rests on that Court's interpretation of Public Law 280 as requiring or authorizing a disclaimer by the State of jurisdiction over this suit, and the case should be remanded for further proceedings regarding the interpretation of the State Constitution and statute, consistent with the views expressed herein.

Respectfully submitted.

REX E. LEE
Solicitor General

FRANK HENRY HABICHT II
Acting Assistant Attorney General

LOUIS F. CLAIBORNE
Deputy Solicitor General

EDWIN S. KNEEDLER
Assistant to the Solicitor General

ELLEN DURKEE
Attorney

AUGUST 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 412398 52

No. 82-629-CSX
Status: GRANTED

Title: Three Affiliated Tribes of the Fort Berthold Reservation, Petitioners
v.
Wold Engineering, P.C., et al.

Docketed:
September 28, 1982

Court: Supreme Court of North Dakota

Counsel for petitioner: Holm, John O.

Counsel for respondent: McCutcheon, Hugh

Entry	Date	Note	Proceedings and Orders
1	Sep 28 1982	G	Petition for writ of certiorari filed.
2	Oct 1 1982		Record filed.
3	Oct 1 1982		Certified original record and exhibits received.
4	Oct 28 1982		Brief of respondent Wold Engineering in opposition filed.
5	Nov 3 1982		DISTRIBUTED. November 24, 1982
6	Nov 29 1982	P	The Solicitor General is invited to file a brief in this case expressing the views of the United States.
7	Apr 4 1983		Lodging received.
8	Apr 4 1983		Brief amicus curiae of United States filed.
9	Apr 6 1983		DISTRIBUTED. April 22, 1983
10	Apr 25 1983		Petition GRANTED.
			**********
12	May 25 1983		Order extending time to file brief of petitioner on the merits until July 9, 1983.
13	Jul 1 1983		Order further extending time to file brief of petitioner on the merits until July 29, 1983.
14	Jul 28 1983		Brief of petitioner Three Affiliated Tribes filed.
15	Jul 28 1983		Joint appendix filed.
16	Jul 29 1983	G	Motion of Standing Rock Sioux Tribe of North and South Dakota, et al. for leave to file a brief as amici curiae filed.
17	Aug 1 1983	G	Motion of Turtle Mountain Band of Chippewa Indians for leave to file a brief as amicus curiae filed.
18	Aug 3 1983		Brief amicus curiae of United States filed.
19	Aug 12 1983	G	Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
22	Aug 15 1983		Opposition of Wold Engineering to motion of Standing Rock Sioux Tribe & Turtle Mountain Band, et al. filed.
23	Aug 30 1983		Brief of respondent Wold Engineering, etc. filed.
24	Sep 8 1983		Motion of Standing Rock Sioux Tribe of North and South Dakota, et al. for leave to file a brief as amici curiae GRANTED.
25	Sep 8 1983		Motion of Turtle Mountain Band of Chippewa Indians for leave to file a brief as amicus curiae GRANTED.
26	Sep 8 1983		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
27	Sep 21 1983		CIRCULATED.
28	Oct 24 1983		SET FOR ARGUMENT. Tuesday, November 29, 1983. (3rd case) (1 hour)
29	Nov 12 1983	X	Reply brief of petitioner Three Affiliated Tribes filed.

No. 82-629-CSX

Entry	Date	Note	Proceedings and Orders
30	Nov 29 1983		ARGUED.